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NOTES TO

Doctoral Dissertation
Law Department
European University Institute
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LEGITIMATING BUREAUCRATIC DECISIONMAKING:
A COMPARATIVE INVESTIGATION OF AIR POLLUTION CONTROL POLICIES

Patrick Del Duca

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Notes - Chapter I


3. Wetstone and Rosencranz, supra n. 2 at 90.

4. 1979 Convention on Long Range Transboundary Air Pollution, Nov. 13-16, 1979, T.I.A.S. No. 10541. The history of its development is in Wetstone, supra n. 2 at 100-05. The convention has been ratified by twenty seven north american, eastern european, and western european states and entered into force in March 1983. The ratifying states are listed in Ursula Wasserman, "Economic Commission for Europe: Air Pollutants," 17 Journal of World Trade Law 533 (1983). The convention engages the signatory states to "endeavour to limit and, as far as possible, gradually reduce and prevent air pollution." The signatory states also agreed to adopt the "best available technology economically feasible." Despite these laudable engagements, France, Britain, Italy, and the

286
communist countries of eastern europe oppose additional control measures, id. at 535, and the United States and Canada remain at loggerheads over their mutual responsibilities with respect to acid rain. Gregory S. Wetstone, "Acid Rain: The International Perspective," 11 Environmental Policy and Law 31-33 (1983).

5. Other systems could also have been included. See e.g. Eric Ashby and Mary Anderson, The Politics of Clean Air (London, Oxford University Press, 1981) (detailing the role of the United Kingdom's central government Alkali inspectorate in the application of the best practicable means standard of control); Jurgen Salzwedel and Werner Preusker, The Law and Practice Relating to Pollution Control in the Federal Republic of Germany 28-78 (2d ed., prepared for Environmental Resources, Ltd., Brussels, Graham and Trotman for Commission of the European Communities, 1982) (air pollution control in West Germany).


7. Id. at 243.

8. Id. at 113.
9. See infra chapter V at notes 159-177.

10. For a contemporary analysis of relationships between Italian political parties and of how these relationships affect political patronage, see Eugenio Scalfari, "Riflessioni sul voto del 12 maggio," La Repubblica of 19-20 May 1985 at 1, 2.


12. However, if one were interested in making it, a place to start would be Air Quality in Selected Urban Areas, 1979-1980, WHO Offset Publication No. 76, (Geneva, World Health Organization, 1983) (indicating Milan as the city suffering from by far the worst sulfur dioxide pollution among a sampling of cities in thirty-eight countries).
Notes - Chapter II


3. Cf. Ronald Rogowski, *Rational Legitimacy: A Theory of Political Support* (Princeton, Princeton University Press, 1974). Rogowski tackles the general question of form of government. He posits that legitimacy is a pure function of self interest, and then investigates the hypothesis that a society's choice of governmental form can be predicted on the basis of a rational utilitarian calculus affected primarily by ethnic and occupational differences.


7. Id.


14. See Breyer, supra n. 6 at 243.


16. For exposition of the formalism, purposivism, and substantive justice arguments and notes to literature treating them, see Unger, Knowledge and Politics, supra n. 1 at 88-100.


18. See e.g. Ackerman, supra n. 1 at 342.

19. See e.g. Alan E. Fuchs, "Fairness to 'Justice as Fairness,,'" in The Limits of Utilitarianism 115 (Harlan B. Miller and
20. See e.g. Ackerman, supra n. 1 at 337.


26. Chayes, supra n. 23 at 1316.

27. Ackerman, supra n. 1.

28. Ackerman, supra n. 1 at 66-68.

29. Ackerman, supra n. 1 at 289. In a responsive lottery each citizen marks a ballot with his or her preferences. One
citizen's ballot is randomly selected as the determining one. Under the responsive lottery procedure, a minority position can prevail, but the occurrence of such an event is less probable than the prevalence of a majority position.

30. Ackerman, supra n. 1 at 307.


32. However, as domination becomes more subtle, e.g. moving from slavery to psychological manipulation, it becomes harder to detect and eliminate. Hence, progress toward the ultimate good of simultaneously maximized autonomy and community may become progressively more difficult.


Notes - Chapter III

1. Judge (now Justice) Corasaniti writes, "Nessun organo di collettività, neppure di quella generale e del resto neppure l'intera collettività generale con unanimità di voti potrebbe validamente disporre per qualsiasi motivo di pubblico interesse della vita o della salute di un uomo, o di un gruppo minore." (No collective body, even of the general collective, nor even the entire collectivity by unanimous vote, could for any reason of public interest dispose of the life or health of a person or of a lesser group.) Court of Cassation, decision no. 5172 of 6 October 1979, Cassa per il Mezzogiorno v. Langiano, 102 Foro it. I, 2302, 2306 (1979).


The basic analysis rests on the determination of the effect of various technologies upon emissions of air pollutants; the effect of changes in emission levels upon ambient air quality; and the effects if changes in air quality on people,
vegetation, and materials. An understanding of the state of technology and its reliability and effectiveness, detailed analysis of atmospheric chemistry and transport processes, and consideration of what may be very subtle biochemical relationships that characterize the impact of air pollution on man are necessary. Unfortunately, existing data do not permit clear and unambiguous determination of cause and effect relationships. There are also difficulties in accurately reflecting the costs of new or proposed technologies for pollution control that involve projections based upon uncertain or unavailable information.


8. By Dr. A. Myrick Freeman for the United States Council on Environmental Quality, cited by Liroff, supra n. 5 at 45.

9. Id. See also The European Community's Environmental Policy 20 (2d ed., European Documentation Series No. 1/1984, Luxembourg, Office for Official Publication of the European Communities) (concluding that damage costs are greater than clean up costs. The variance in the national figures cited therein is an indication of the inherentcrudeness of such estimates.).

10. See e.g. Christopher Schroeder, "A Decade of Change in Regulating the Chemical Industry," 46(3) Law and Contemporary Problems 1, 30-38 (1983) (recounting how EPA softened the seemingly absolutist language of air and water pollution control statutes with regard to toxic pollutants).


Notes - Chapter IV

1. United States constitution, Art. II, s 2, cl. 2.


9. Id.

10. See generally, Stewart, supra n. 4. See also Breyer, supra chapter II n. 6 at 350-54.

11. Stewart, supra n. 4 at 1670.


13. Id. at 379-80.


15. 5 U.S.C. s 552 et seq.

16. 42 U.S.C. s 7607(b), (d).


20. See infra chapter V, notes 380-81.

21. See infra notes 57-61.


24. Id. at 433.


26. 17 C.F.R. § 240.10b-5.


29. *Merrill Lynch*, 102 S.Ct. at 1840-41; *Scientex Corp. v. Kay*, 689 F.2d 879, 884 (9th Cir. 1982).


33. Lettie M. Wenner, *The Environmental Decade in Court* 45 (Bloomington, Indiana University Press, 1982). Wenner cites: *NRDC v. EPA*, 421 U.S. 60 (1975); *NRDC v. EPA*, 484 F.2d 1331 (1st Cir. 1973); *NRDC v. EPA*, 494 F.2d 519 (2d Cir. 1974); *NRDC v. EPA*, 489 F.2d 390 (5th Cir. 1974); *NRDC v. EPA*, 483 F.2d 690 (8th Cir. 1973); *NRDC v. EPA*, 507 F.2d 905 (9th Cir. 1974); *NRDC v. EPA*, 481 F.2d 116 (10th Cir. 1973).


37. See Chayes, supra n. 8 at 1311-12.

38. Stewart, supra n. 4 at 1688.

39. See Breyer, supra chapter II n. 6 at 346-50.

40. See e.g. Stewart, supra n. 4.

42. See e.g. Breyer, supra chapter II, n. 6, especially at 195.


44. 42 U.S.C. § 7411(b)(6).

45. Sierra Club v. Costle, 657 F.2d 298, 316 (D.C. Cir. 1981); 44 Fed. Reg. 33580 (June 11, 1979). The new standards retained the old ceiling for sulfur dioxide, but added the requirement that potential uncontrolled sulfur dioxide emissions be reduced by 90% except when emissions are less than 0.60 pounds/million BTU, in which case 70% reduction is required. With respect to the old standard the standard actually selected was expected to reduce new plant emissions of sulfur dioxides by 50%, of particulates by 70%, and of nitrogen oxides by 20%. Elisabeth H. Haskell, The Politics of Clean Air: EPA Standards for Coal Burning Power Plants 1 (New York: Praeger Publishers, 1982).

46. Haskell, supra n. 45 at 5-6.

47. Id. at 26.

48. The Teknekron/ICF account is drawn from Haskell. See Haskell at 26-27, 47-51.

49. Haskell at 50.
50. Id. at 49.

51. Id. at 50.

52. Id. at 116.


54. Haskell at 10.


56. Id. at 334-35.

57. 42 U.S.C. s 7607(f).

58. Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982).


62. Haskell, supra n. 45 at 117-18.

63. Id.

64. Id.

65. Id. at 117.


70. Vedel, supra n. 68 at 146.

71. Id. at 150.

73. Id. at 375-76.


77. Constitutional law no. 74-904 of 29 October 1974, 1974 JO 11035.

78. See infra Chapter V text accompanying notes 193-199.

79. See Vedel, supra n. 68, at 383 citing the following examples: freedom of association (decision of 16 July 1971, 1972 Recueil Dalloz-Sirey, Jurisprudence 685; 1971 JO 7114); equality


81. See Anna DeVita, "I valori costituzionali come valori giuridici superiori nel sistema francese," 1984 Quaderni costituzionali 41.

82. Vedel, supra n. 68 at 712.

83. Id. at 724.


85. Id. at 725-29.

86. See id.

87. Gilbert-Francois Caty, "Associations ecologiques s'organisent contre la pollution industrielle," 107 Humanisme et Entreprise 1, 6 (77 rue de Villiers, 92 Neuilly) (1980).

88. Hostiou, supra n. 84 at 216-17.

89. Id. at 235-36.

90. Id. at 240.


92. Id. at 30-31.

93. Hostiou, supra n. 84 at 233 note 6.

95. Id. at 242.

96. Article 1382 et seq. of the civil code.


98. See The Law and Practice Relating to Pollution Control in France, 2d ed., at 5-6 citing Court of Cassation, Ch. civ., 1re sect. civ., decision of 5 November 1963, 1964 Receuil Dalloz, Jurisprudence 178 (Civil courts can entertain nuisance actions, but they cannot contradict measures taken by the administration in the public interest. Closing a classified installation permitted by the public administration constitutes an impermissible contradiction).


100. The enquete is required by article 5, law no. 76-663 of 19 July 1976, 1976 JO 4320, and by article 5 of the decree no. 77-1133 of 21 September 1977, 1977 JO 4897.


4897, reiterates the necessity of these impact studies for classified installation permits.

103. Caty, supra n. 87 at 6-7.

104. See id.; Hostiou, supra n. 84 at 6-7 (describing the entire process as "une formalite dont l'objet n'est fondamentalement que de legitimer une decision elaboree unilateralement par les pouvoirs publics" |a formality whose fundamental purpose is to legitimate a decision unilaterally elaborated by the public authorities|); Cabellero, supra n. 91 at 162-68.


106. Id., article 2.

107. Id.

108. Id., article 3.

109. Id.

110. Id., article 4.

111. Id.
112. Id., article 6.

113. Id., article 8.


115. Article 11(2), decree no. 77-1133 of 21 September 1977, 1977 JO 4897. This decree requires the prefect to ask for a number of nonbinding opinions. They are from the municipal councils of the communes affected (article 8, id.) and various departmental services (article 9, id.). The prefect must present the report of the inspection des installations classees to the Conseil Departementale d'hygiene, before which the requestor of the authorization may appear, but from which third parties are excluded. Article 10, decree no. 77-1133. The Conseil Departementale d'hygiene is composed of doctors and sanitary engineers, as well as representatives of industry groups. Law of 15 February 1902, article 776, Code of Public Health. For especially hazardous activities the opinion of the departmental council is required. Article 15, decree no. 77-1133. For activities affecting more than one department, the opinion of the regional council is requested. Article 16, id.

117. Article 14(2), id.

118. Although decentralization was never undertaken until 1982, it was certainly talked about a lot. See Yves Meny, Centralisation et decentralisation dans le debat politique français (1945-1969) (Paris, Librairie generale de droit et de jurisprudence, 1974) (commenting on the development of themes of participation, responsibility, legitimacy, and autonomy in French political debate on decentralization).


120. Yves Meny, "Amministrazione statale e poteri locali in Francia," 1984 Riv. trim. di diritto pubblico 556, 558; Meny, supra n. 67 at 337. Italy in contrast has only about 8000 comunes. Sabino Cassese, Il sistema amministrativo italiano 144 (Bologna, Il Mulino, 1983). Of these about 90% have less than 10,000 inhabitants, and only 1% more than 60,000. Cassese at 163.

121. Id. at 562-63.

122. For lists of implementing texts, see Yves Meny et al., Administration 82 53-57 (Paris, Institute international
d'administration publique, 1983); Marie-Christine Henry-Meninger, Yves Meny, et al., Administration 83 16-20 (Paris, Institut international d'administration publique, 1984).

123. Law no. 82-213 of 2 March 1982 relative aux droits et libertes des communes, des departements et des regions, 1982 JO 730, rectificatif 1982 JO 779.


125. Machin, supra n. 119 at 17.

126. Jean Emile Vie, La decentralisation sans illusion 27 (Paris, PUF, 1982).

127. Id. at 33-34.

128. Machin, supra n. 119 at 188-293.

129. Id.

130. Id. at 31 and 139-42. See also Jean-Francois Auby, "La nouvelle organisation departementale," 38 L'Actualite Juridique: Droit Administratif 331, 337 (1982).

131. Machin, supra n. 119 at 34.
132. Article 59, supra n. 123.

133. Article 71, id.

134. Article 24, id.

135. Articles 25 and 26 (for departments); article 73 (for regions), id. See also article 11, law no. 83-8 of 7 January 1983, 1983 JO 215-20, rectificatif, 1983 JO 706 (regarding the repartition des competences entre les communes, les departements, les regions et l'etat).

136. Article 34 (department); article 79 (region), supra n. 123.

137. See articles 3, 46, and 69, for communes, departments, and regions respectively, id. The state representative for the department is the referring authority for both communes and the department.

138. Auby, supra n. 130 at 332.

139. Article 2, law no. 83-8, supra n. 135.

140. Meny, supra n. 67 at 339-40.

142. Law no. 82-623 of 22 July 1982, 1982 JO 2347.

143. Law no. 83-8, supra n. 135.

144. See Administration 83, supra n. 122 at 12-13.

145. Articles 8 and 9, law no. 83-8, supra n. 135.

146. Meny, supra n. 67 at 341.

147. See Administration 83, supra n. 122 at 11-12.

148. Vie, supra n. 126 at 118-23.

149. Meny, supra n. 67 at 343-49.

150. Article 90, supra n. 123. See Auby, supra n. 130 at 337-38.

151. These two possibilities are hypothesized by Meny, supra n. 120.


153. Id. at 17-18.

154. Id. at 73.
155. Id. at 115-17.

156. Id.

157. Id. at 282 gives the example of an office in Milan and an office in Naples with similar workloads. The Naples office had roughly a third more employees. (291 in Naples, 193 in Milan).

158. Id. at 55-56.

159. Id. at 65-66.


161. Id. at 206.

162. Cassese, supra n. 152 at 51.

163. Article 67, presidential decree law no. 748 of 30 June 1972, Gaz. uff. no. 320 of 11 December 1972; Cassese, supra n. 152 at 75.

164. Law no. 355 of 14 August 1974, Gaz. uff. no. 217 of 20 August 1974; Cassese, supra n. 152 at 75.

317
165. Cassese, supra n. 152 at 274-75. At 274 he observes, "Il difetto principale dell'amministrazione italiana sta nella irrazionale distribuzione delle funzioni." (The principal defect of the Italian administration is in the irrational distribution of functions.)

166. Id. at 280-83.

167. Id. at 189.

168. Id. at 45-48.

169. Law no. 290 of 25 June 1908, Gaz. uff. no. 149 of 26 June 1908; law no. 304 of 30 June 1908, Gaz. uff. no. 151 of 30 June 1908.

170. Notably Royal decree no. 2395 of 11 November 1923, Suppl. gaz. uff. no. 270 of 17 November 1923; Presidential decree law (Testo unico) no. 3 of 10 January 1957, Suppl. gaz. uff. no. 22 of 25 January 1957; law no. 312 of 11 July 1980, Suppl. no. 1 to Gaz. uff. no. 190 of 12 July 1980.

172. Sorace labels the notion of neutral execution of the law a "mistificante ideologia." Id. at 794.


177. Articles 134-137, Constitution of Italy.

178. Article 1, constitutional law no. 1 of 9 February 1948, Gaz. uff. no. 43 of 20 February 1948; article 23, law no. 87 of 11 March 1953, Gaz. uff. no. 87 of 14 March 1953.


181. Id. at 149.
182. Id. at 151.

183. See Mario P. Chiti, Partecipazione popolare e pubblica amministrazione 258-63 (Pisa, Pacini, 1977).

184. The provision is article 3, law no. 5992 of 31 March 1889, now contained in article 26, Royal decree no. 1054 of 26 June 1924, Gaz. uff. no. 158 of 7 July 1924. Substantially unchanged, it reads, "Spetta al Consiglio di Stato in sede giurisdizionale di decidere sui ricorsi per incompetenza, per eccesso di potere o per violazione di legge, contro atti e provvedimenti di un'autorità amministrativa o di un corpo amministrativo deliberante, che abbiano per oggetto un interesse d'individui o di enti morali giuridici . . . ." (It is for the Council of State in its judicial capacity to decide on challenges for lack of jurisdiction, excess of authority or violations of law against acts and provisions of an administrative authority or a deliberative administrative body, which might have as their object an interest of an individual or of a legal person . . . ).

186. Id. at 47.


188. See Marco Cammelli, L'amministrazione per collegi (Bologna, Il Mulino, 1980).

189. Id. at 77-78.

190. Id.


192. But see Breyer, supra chapter II n. 6 at 354-56, saying that whether an agency is headed by a multimember board or a single chief appears irrelevant to the making of major changes in substantive agency policy at the federal level.


194. Sorace, supra n. 171 at 796. See also Chiti, supra n. 183, especially at 150.

195. Article 125, Constitution of Italy.
196. Article 126, Constitution of Italy.


198. See Landi and Potenza, supra n. 180 at 573-75, who ignore the consequences of decentralization.

199. The treaty can be found in Treaties establishing the European Communities; Treaties amending these treaties; Documents concerning the accession (Luxembourg: European Communities, 1973).


201. Hartley at 12-14; Mathijsen at 38.


203. Id. at 26 et seq.

205. 16 O.J. Eur. Comm. (No. C 112) 1 (1973). The first action program established objectives and principles of EEC environmental policy and set priorities for a two year period. General principles of EEC environmental policy established by the first action program include recognition of the need for preventive action, that action should be at the appropriate level of government, and the responsibility of the polluter. Id. at 6-7. The polluter pays principle advanced by the OECD is accepted with the qualifications that special arrangements and transition periods may be permissible. Id. at 6. For exposition of the polluter pays principle and its consequences, see The Polluter Pays Principle: Definition, Analysis, Implementation (OECD, Paris, 1975).

Lead, sulfur compounds, particulates, nitrogen oxides, carbon monoxide, and hydrocarbons among others were identified as pollutants to which priority was to be given in establishing criteria of harm and standardized measurement methods. 16 O.J. Eur. Comm. (No. C 112) 1, 8, 13 (1973). Water pollutants were however to be accorded priority for standard setting, id.
at 9, although harmonization of vehicle specifications was also a priority. Id.


207. For an outline of the debate, see Beraud, supra n. 204.

208. For an analysis of how various articles of the EEC Treaty might be used for environmental protection, see Eberhard Grabitz and Christoph Sasse, Competence of the European Communities for Environmental Policy: Proposal for an Amendment to the Treaty of Rome 24-31 (Berlin, Erich Schmidt Verlag, 1977).
209. Limits to reliance on article 100 are that at least one member state must have some provisions in the field and that the national provisions must directly affect the establishment or functioning of the common market. Articles 101 and 102 concerning actual and potential distortions of competition could also in principle be relied on; however, distortion of competition is a difficult concept to define, and before a directive is issued, the Commission must consult the state involved.


213. See Third Environmental Action Program, point 9, 26 O.J. Eur. Comm. (No. C 46) 1, 5 (1983) ("The ultimate objectives of environment policy are the protection of human health, the
long-term availability of all the resources which determine the quality of life, of adequate quality and in sufficient quantity, namely, water, air, space -- from both the land-use and landscape points of view -- climate, raw materials, the built environment, and the natural and cultural heritage, as well as the maintenance and, where possible, the restoration of the natural environment with suitable habitats for flora and fauna.


215. Case 22/70, Commission v. Council, AETR, 1971 ECR 263, 273-76 (A regulation on transportation labor policy, aimed primarily at internal matters, implied exclusive Community power to conclude international agreements to assure its implementation); joined cases 3, 4, 6/76, Cornelis Kramer and others, Biological Resources of the Sea, 1976 ECR 1279, 1309-11 (The EEC treaty and measures implementing it have conferred exclusive authority on the Community to conclude agreements concerning conservation of fisheries, and member states are obliged jointly to assist the Community initiatives); opinion 1/76 (Draft Agreement establishing a European laying-up fund
for inland waterway vessels), 1977 _ECR_ 741 (in an advisory opinion under article 228(1) of the EEC Treaty on the compatibility of a treaty regulating inland waterway transportation with the EEC Treaty, the Court, although finding that the Community had the power to enter into such a treaty, found that the treaty conflicted with certain provisions of the EEC Treaty).


217. The Council's failure to consult the European Parliament when required to do so by the treaty is grounds for the Court of Justice to void an eventual action by the Council. _Case 138/79, SA Roquette Freres v. Council of the European Communities_, 1980 _ECR_ 3333, 3360-61.


221. See Mathijsen at 97-109, supra n. 200.


226. For recent statistics, see Giuseppe Ciavarini Azzi, "L'Application du droit communautaire dans les etats membres:

227. Weiler supra n. 220 at 458.

228. See Azzi, supra n. 226 at 194-208.


231. See Hartley, supra n. 200 at 224-46.

232. See case 26/62, van Gend & Loos v. Nederlandse administratie der belastingen, 1963 ECR 1 (increase in customs duty declared illegal pursuant to article 12, EEC treaty); case 6/64, Costa v. ENEL, 1964 ECR 585 (article 53 - free right of establishment, and article 37 - nondiscrimination against other member state nationals, are directly applicable); case 2/74 Reyners v. Belgian State, 1974 ECR 631 (article 52, dealing with freedom of establishment, directly applicable); case 33/74, Van Binsbergen v. Bestuur, 1974 ECR 1299 (article 59 with respect to right of establishment directly invalidates laws treating other member state nationals unequally).


235. Id. at 645-46.

236. Case 148/78, Pubblico Ministero v. Ratti, 1979 ECR 1629; case 8/81, Ursula Becker v. Finanzamt Munster-Innenstadt, 1982 ECR 53, 71 ("whereas the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State.").


4. Id. at 124.


7. The comune of Torino, a city of about 1.2 million, took the initiative to contain air pollution caused by space heating. It issued a municipal ordinance in the face of inadequate national efforts to address the problem. See Bruno Dente,
8. 42 U.S.C. s 7543 permits California to do so.


11. Chicago, Ill., Laws and Ordinances, part V, article XXVII, s 1451(2016), and article XXIX, s 1650-2(2253-5) (1890), cited by Currie at 1-8.


18. See generally Currie, supra n. 10 at 1-9 to 1-21.


20. Id.

21. Id. at 114.

22. Id.


24. Id.

25. Id.

26. Id. at 75.
27. Id. at 76.
28. Id. at 80.
29. Id. at 81.
30. Id. at 92-103.
31. Id. at 119.
33. Id.
34. Id.
35. Laitos at 168-214.
36. Id. at 276.
37. Id. at 276-77.
38. Id.

40. L. 1967, c.83. As subsequently amended, Wisconsin air pollution law is set out at W.S.A. 144.30 et seq.

41. Created in 1967 by W.S.A. 15.34. See Laitos at 307.

42. Laitos at 327.


44. 42 U.S.C.A. s 7410.


46. Laitos at 327.

47. 42 U.S.C. s 7607(d)(9).


336
49. See Russell W. Peterson (former head of the Council on Environmental Quality under Presidents Nixon and Ford), "Laissez-Faire Landscape," New York Times Magazine, October 31, 1982 at 27; David W. Barnes, "Back Door Cost-Benefit Analysis Under a Safety-First Clean Air Act," 23 Natural Resources Journal 827 (1983). After briefly documenting the decrease in enforcement, Barnes elegantly argues that attempting to adopt a cost benefit justified level of air quality by reduced enforcement of safety first standards may lead to a lower level of air quality than justified by cost benefit considerations because when polluters do attempt to comply they will have used more expensive control technology than necessary to achieve the cost benefit justified control level. Accordingly, they will be motivated to control even less than to the cost benefit level.

50. 42 U.S.C. s 7401-7462. A comprehensive treatise on the Clean Air Act is Currie, supra n. 10. After analyzing the many problems with the Act, Currie concludes that it "is extremely untidy, but it works." Id. at 10-5. For discussion of some of the reforms needed to simplify the permitting process, see Patrick Del Duca, "The Clean Air Act: A Realistic Assessment of Cost-Effectiveness," 5 Harvard Environmental Law Review 184 (1981).

52. 42 U.S.C. § 7408-7409. Two kinds of standards are to be established. Primary standards are to protect human health. Secondary standards, whose attainment is less urgent, are to protect general welfare.

53. See Del Duca, supra n. 50 at 187. Standards were initially established for sulfur dioxide, nitrogen oxides, total suspended particulates, ozone, carbon monoxide, and hydrocarbons. Lead was later added.


56. For a study illustrating the economic and environmental difficulties which must be confronted in developing a SIP, see "Ohio River Basin Energy Study (ORBES)," EPA, Springfield, VA, National Technical Information Service, 1981, no. PB 81-161788.


60. 42 U.S.C. § 7501 et seq.
61. 42 U.S.C. s 7521.


63. 42 U.S.C. s 7507.

64. 42 U.S.C. s 7411.

65. 42 U.S.C. s 7409(b).


68. 42 U.S.C.A. s 7410.

69. 71 P.S. s 510-1(23). See Jones, supra n. 19 at 232.

70. 35 P.S. s 4004.

71. P.L. 193, no. 92. See Jones, supra n. 19 at 50-52.
72. Jones, supra n. 19 at 50.

73. P.L. 193, no. 92 See Jones, supra n. 19 at 52.

74. Jones, supra n. 19 at 237.

75. Id.


82. 42 U.S.C. s 7506(a).

83. 42 U.S.C. 7616(b)(2).

84. Ostrov, supra n. 77 at 141.

85. Id. at 153-58 and 170-72 (describing the associated administrative and litigation battle).

86. Id. at 158-59 (describing the associated administrative and litigation battle.)

87. Id. at 163-90.


requirements were to be in line with federal requirements. Ill.Rev.Stat.1983, ch. 111/2, par. 1009.1.


97. Haskell and Price, supra n. 88 at 3-4.

98. Id. at 30.

99. Id.

100. Id. at 4.

101. Minnesota Statues s 116.01 et seq.

102. Haskell and Price, supra n. 88 at 43.
103. Minnesota Statutes s 116.02.

104. Minnesota Statutes s 116.07. See Haskell and Price, supra n. 88 at 43.

105. RCW 70.94. Enforcement options included obtaining judicial injunctions, fines upto $250 per day per violation, and prison terms for upto a year. RCW 70.94.25, 70.94.430, 70.94.431. The Act also provides for state development of contingency plans for acute air pollution episodes and gives the governor the power to halt emissions on an emergency basis. RCW 70.94.710, 715, 720, 725, 730.

106. Haskell and Price, supra n. 88 at 70.

107. RCW 70.94.141, RCW 70.94.151, RCW 70.94.152, RCW 70.94.181, RCW 70.94.211.

108. RCW 70.94.100. See Haskell and Price, supra n. 88 at 84.

109. RCW 43.21B.110

110. RCW 43.21B.180, 43.21B.190, 43.21B.200.

111. Haskell and Price, supra n. 88 at 84.

112. RCW 70.94.091.

343
113. RCW 70.94.331.

114. RCW 70.94.410.

115. Haskell and Price, supra n. 88 at 41.

116. ECL s 19-0101 et seq.

117. ECL s 19-0301. See Haskell and Price, supra n. 88 at 136.

118. Haskell and Price, supra n. 88 at 136.

119. Id. at 152-53.

120. State of New York, 6 Official Compilation of Codes, Rules, and Regulations Part 206.

121. See EPA, "EPA Enforcement: A Progress Report 5-6" (1975), cited by Stewart, supra n. 4 at 1200.

122. Id.


124. Id.
125. Term used by Caballero at 25.

126. Law no. 61-842 of 2 August 1961, 1961 JO 7195.


129. Michel Prieur, "La Politique regionale de l'environnement en France, 1984 Revue Juridique de l'Environnement 107, discusses the limited decentralization of environmental policy with respect to regional planning.


131. In this sense, see Jean G. Padioleau, L'Etat au Concret 127-28 (Presses Universitaires de France, 1982).

132. The national limit on sulfur content of heating and diesel fuel passed from 0.5% in 1980 to 0.3% in conformity with Community norms (arretes of 28 March 1980, 1980 JO 824; arretes of 6 December 1977, 1977 JO 5848). For Community norms, see infra notes 419 et seq. For a complete list of French fuel quality limits, see The Law and Practice Relating to Pollution Control in France 20 (2d ed., prepared by Michel Despax and William Coulet for Environmental Resources Ltd.,
The basic provision is article R. 69 of the Code de la Route (decree no. 69-150 of 5 February 1969, 1969 Receuil Dalloz-Sirey, Legislation 87, 92; 1969 JO 1479) which specifies that vehicles should not cause emissions "susceptibles d'incommoder la population ou de compromettre la sante et la securite publique." Based on this decree and the express references of the law of 2 August 1961 on air pollution, 1961 JO 7195, to vehicular pollution, central authorities have issued a series of arretes.

In conformity with Community directives these arretes establish norms for new cars. Carbon monoxide and hydrocarbon emissions were first regulated starting September 1, 1972 (arrete of 30 June 1970, JO 2 September p. 8191). In 1975 national controls were administratively adapted to the 1974 amendments of the Community standards. 1975 JO 2207, 2216, 2229. Nitrogen oxide emissions from gasoline cars were regulated after October 1, 1977 pursuant to EEC directive 77/120/EEC, 1977 JO 7064. The limits for carbon monoxide, hydrocarbons, and nitrogen oxides were reduced 15, 10, and 15 percent respectively after October 1, 1979 in compliance with Community rules. Arrete of 4 October 1977, 1977 JO (NC) 7064.
Smoke limits for diesel engines as a function of motor size were established October 1, 1975 (arrete of 13 February 1974, 1974 JO 3965), and updated by the arrete of 3 January 1978, 1978 JO (NC) 721. The sulfur content of gas oil has been regulated by the same provisions as domestic fuel. The limits are subject to change pending new EEC rules.

Lead limits in gasoline were set at 0.50 grams/liter as of January 1979 and 0.40 grams per liter as of January 1981 in compliance with Community norms by the arretes of 13 October 1978 (1978 JO 3649-50).


136. Dambrine and Bartaire, supra n. 135 at 4.

137. Id. at 5.

138. Id. at 6.

139. Id. at 6-7.


141. Caballero, supra n. 123 at 51.

142. The sources covered by the law no. 76-663 of 19 July 1976, 1976 JO 4320, include not only new industrial installations, but also state and local installations (with the notable exception of nuclear power plants), noncommercial installations, and petroleum related installations (which had previously been exempted). Decree no. 77-1133 of 21 September 1977, 1977 JO 4897, implements the 1976 law. See generally Christian Gabolde, Les installations classees pour la protection de l'environnement (Editions Sirey, 1978); Michel

143. Article 17, decree no. 77-1133 of 21 September 1977. This article incorporates a principle firmly established in French administrative law by the well known decision of the Council of State in *Ville Nouvelle Est* (Council of State, decision of 28 May 1971, *Ministre de l'Equipement et du Logement v. Federation de defense des personnes concernees par le project actuellement denomme "Ville nouvelle Est,"* 1972 Recueil Dalloz Sirey, Jurisprudence 194. The Council of State held that in expropriation of private property for a public purpose, the declaration of public utility is proper only if the burdens imposed on private property rights and the financial costs are not excessive with regard to the interest motivating the expropriation. For extensive literature commenting on the case, see Rene Hostiou, "Amenagement et environnement: le contentieux associatif devant les juridictions administratives," 10 Droit et ville 215-43, 223 note 29 (1980). See also Caballero, supra n. 123 at 93-103, who after identifying the decision as the foundation of a new principle of cost benefit analysis in French administrative law concludes that as a practical matter it has little relevance.

144. "Industrialisation and Environmental Protection in France," Service de l'Environnement Industriel, Direction de la
145. Article 28, law no. 76-663 of 19 July 1976. See also Gabolde, supra n. 142 at 32-40.

146. Caballero, supra n. 142 at 53.

147. Id. at 109-112.

148. Gabolde, supra n. 142 at 36.

149. Id. at 38-39.


151. Article 18, decree no. 77-1133 of 21 September 1977.

152. Article 3, law no. 76-663 of 19 July 1976.

153. Articles 3, 10, law no. 76-663 of 19 July; article 29, decree no. 71-1133 of 21 September 1977. See Gabolde, supra n. 142 at 160-68.

155. Industrialisation and Environmental Protection in France, supra n. 144 at 4.

156. Billaudot and Besson-Guillaumot, supra n. 135 at 261.

157. Industrialisation and Environmental Protection in France, supra at 4.

158. Billaudot and Besson-Guillaumot, supra n. 135 at 261.


160. Suleiman, Elites in French Society, supra n. 159 at 69.

161. Id.

162. Id. at 29, 39, 99.

163. Id. at 120, 123.

164. Formerly known as a Direction Interdepartementale Industrielle, Service des Mines, or Inspecteurs des Etablissements Classes. Each one has sections responsible for
various kinds of environmental problems including air pollution.


166. Caballero, supra n. 123 at 149.

167. Id. at 129.

168. Id. at 149.

169. "(L)es directions et services des administrations centrales chargés de ces attributions sont placés sous son autorité et les services départementaux et régionaux des administrations concernées sont mis à sa disposition en tant que besoin."


171. Suleiman, Elites in French Society, supra n. 159 at 214-17.

173. Id. at 158-59.


177. For an indication of what a similar attitude of respect premised on engineering skill could accomplish in the United States, see Laurence H. Edelman and Robert E. Walline, "Developing a Cooperative Approach to Environmental Regulation," 16 Natural Resources Lawyer 489 (1983), describing the problems lawyers had in making engineers an essential part of the resolution of extensive litigation concerning water pollution from a mining operation.

178. The contracts were signed with the following industries:
Paté a papier (1972), Industrie sucriere (1973), Feculerie, levurie (1975), Distillerie (1975), and Delainage, megisserie, lavage et peignage de laine (1977). For descriptions of the contracts and of the generally positive results obtained, see "La politique contractuelle d'antipollution," Le mois de
179. These agreements were with the following industries:
Cimenteries (1972), Traitements de surface (1972), Electrolyse
des chlorures alcalins (1974), and Equarrissages (1977). For
details of the agreements and of the generally successful
results obtained, see "La politique contractuelle
d'antipollution," at 8-12, supra note 178. The branch program
for the cement industry is discussed in Jean G. Padoleau,
L'Etat au Concret (Paris, Presses Universitaires de France,
1982).

180. For details, see "La politique contractuelle
d'antipollution," at 13, supra n. 178.

181. Author's personal conversations with French industrialists.

182. Association Francaise de l'Amiante: l'industrie rend compte
de cinq annees de travail 31 (Paris: Association Francaise de

183. For text, see id. at 100-08.

184. For text, see id. at 109-13.

185. Caballero, supra n. 123 at 152-57.
A publication of the environment ministry compiles twenty-five of these arrêtés types, "Principaux Textes Legislatifs et Reglementaires Relatifs a la Lutte Contre la Pollution Atmospherique, Installations Classees," Ministere de l'Environnement et du Cadre de Vie, Direction de la Prevention des Pollutions, Service des problemes de l'atmosphere, April 1979. Of these twenty five texts, twenty were circulaires published in the Journal Officiel. One was an arrête published in the Journal Officiel, and two were unpublished instructions. They were all technical, formulated in mandatory style, and directed to very specific kinds of industrial installations, e.g. sugar beet refineries, storage depots for nonrefrigerated liquid ammonia, alkaline chloride electrolysis workshops, etc. The Service des problemes de l'atmosphere within the Direction de la prevention des pollutions et nuisances is responsible for formulating these arrêtés types. A more complete listing can be found in "Installations Classees pour la Protection de l'Environnement" ("Brochure 1001"), Tome I (Textes Generaux, Nomenclature)

191. However, such susceptibility would presumably be less than in other systems' local authorities by virtue of the fact that prefects are administrative agents of central authorities.

192. For an overview, see Hartley, supra chapter IV n. 200 at 232-37.

193. See e.g. supra notes 132, 133.


198. Decision of 22 October 1979, id.


201. Padioleau, supra n. 179 at 136, urges the incorporation of local public input as an important reform.
Una peculiare e non secondaria ragione di inefficienza degli apparati pubblici in materia di ambiente e sempre stata individuata in una legislazione che, come la nostra, affidi compiti di tutela e salvaguardia a troppi poteri, ciascuno dei quali ha un pezzo di competenza e dispone di strutture ad essa correlate. Con la nota conseguenza che quando i poteri sono troppi e non coordinati tra loro e come se non ci fosse alcun potere." (A peculiar and non secondary reason for the inefficiency of the public bureaucracy in environmental matters is our legislation which gives protective powers to too many powers, each of which has only a fragmented piece of jurisdiction. The notable consequence is that when powers are too many and non coordinated, it is as if there were no power.) Franco Giampietro, Diritto alla salubrità dell'ambiente: inquinamenti e Riforma Sanitaria 57 (Milano: Giuffre, 1980). See also Gianfranco Amendola, In nome del popolo inquinato: Manuale giuridico di autodifesa ecologica 57-59 (Milano, Franco Angeli Libri, 1985) (complaining of the lack of administrative infrastructure and of the lack of clarity in the overlapping laws treating air pollution).

See Amedeo Postiglione, Manuale dell'ambiente: Guida alla legislazione ambientale 40-41 (Roma, La nuova Italia scientifica, 1984).

See discussion of presidential decree law no. 616, infra notes 213-215.
205. Accordingly, if Nicola Assini, "Urbanistica e tutela dell'ambiente nella giurisprudenza della Corte costituzionale," 28 Giur. Cost. 1056, 1065 (1983), means to imply that a conclusion that environmental protection is not included within urbanistica would in some way render the presidential decree law no. 616 unconstitutional, he is wrong.

206. Article 117 provides: "La Regione emana per le seguenti materie norme legislative nei limiti dei principi fondamentali stabiliti dalle leggi dello Stato, sempreche le norme stesse non siano in contrasto con l'interesse nazionale e con quello di altre Regioni;
ordinamento degli uffici e degli enti amministrativi dipendenti dalla Regione;
circoscrizioni comunali;
polizia locale urbana e rurale;
fiere e mercati;
beneficenza pubblica ed assistenza sanitaria ed ospedaliera;
istruzione artigiana e professionale e assistenza scolastica;
musei e biblioteche di enti locali;
urbanistica;
turismo ed industria alberghiera;
tranvie e linee automobilistiche di interesse regionale;
viabilita, acquedotti e lavori pubblici di interesse regionale;
navigazione e porti lacuali;
acque minerali e termali;"
cave e torbiere;
caccia;
pesca nelle acque interne;
agricoltura e foreste;
artigianato;
altre materie indicate da leggi costituzionali.
Le Leggi della Repubblica possono demandare alla Regione il potere di emanare norme per la loro attuazione.


208. Id. For analysis of the Court's jurisprudence, see Assini, supra n. 205; Massimo Severo Giannini, "Documento Conclusivo," in Dalla Lotta all'Inquinamento alla Tutela Pubblica dell'Ambiente, Atti del Convegno 4-5 Marzo 1977, Milano-Bruzzano 159 (Consiglio Regionale della Lombardia, Studi Regionali, Milano, Giuffre, 1978) (arguing that environmental protection falls within the listed categories of agriculture and forests, urbanism, health, and public welfare). Contra, Mario Cicala, "La normativa in materia ecologica nel quadro dei rapporti fra Stato e regioni," 5 Impresa, ambiente e pubblica amministrazione I, 98, 100 (1978).
209. Constitutional Court, decision no. 141 of 24 July 1972, 36 Rac. uff. 263, 276-77 (1972); 17 Giur. cost. 1415, 1424 (1972) (full state transfer to the regions of administrative responsibility for "urbanistica" does not require transfer of functions for protection of scenic beauty).

210. Assini, supra n. 205 at 1056.

211. Id. at 1060-61.

212. See id. at 1061 citing Constitutional Court, decision no. 66 of 22 December 1961, 12 Rac. uff. 271 (1961); 6 Giur. cost. 1240 (1961). This decision, however, makes only the limited statement "(l)e formule adoperate negli Statuti si debbono interpretare secondo il significato che hanno nel comune linguaggio legislativo e nel vigente ordinamento giuridico . . ." (formula adopted in regional statutes must be interpreted according to the meaning they have in common legislative language and in the prevailing legal order) 12 Rac. uff. at 278; 6 Giur. cost. at 1247-48. Although the regional statute of which the Constitutional Court was speaking is of the same constitutional rank as the Constitution, it is not possible to tell from the case whether the Court was referring to the legal system as it existed at the time of the adoption of the statute or at the time of its interpretation. Both interpretations are consistent with the Court's holding that authorizing issuance of bearer stocks to
promote agriculture, industry and commerce exceeds the regions' autonomous powers for those subject matters.


214. Article 80 provides: "Le funzioni amministrative relative alla materia 'urbanistica' concernono la disciplina dell'uso del territorio comprensiva di tutti gli aspetti conoscitivi, normativi e gestionali riguardanti le operazioni di salvaguardia e di trasformazione del suolo nonché la protezione dell'ambiente." (The administrative functions relating to "urbanistica" concern the regulation of territory including all aspects of information gathering, regulation, and management regarding operations of safeguarding and transforming the land as well as protection of the environment.)

215. See Assini, supra n. 205 at 1065.

216. Decision no. 141, supra n. 209 at 36 Rac. uff. at 283; 17 Giur. cost. at 283.

217. The Law and Practice Relating to Pollution Control in Italy 20-22 (2d ed., prepared by M. Guttieres and U. Ruffolo for

219. Article 104, presidential decree law no. 616 of 1977, supra n. 213.

220. Article 14, presidential decree law no. 1391 of 22 December 1970, Suppl. ord. gaz. uff. no. 59 of 8 March 1971. Articles 8-19, law no. 615 of 13 July 1966, Gaz. uff. no. 201 of 13 August 1966, anticipated limits on fuel quality and a permitting program for combustion installations. These provisions were modified by presidential decree law no. 400 of 8 June 1982, Gaz. uff. no. 181 of 3 July 1982, in order to comply with the directive 75/716/EEC on the sulfur content of gas oil. The directive requires type A fuel to have 0.3% maximum sulfur content by 1980 and type B fuel to have 0.5% maximum sulfur content by 1980. The law mandates the type A limit only in 1985 and the type B limit only in 1983.

221. See n. 241.

222. See n. 227.
223. Articles 216, 217 TULS approved by royal decree no. 1265 of 27 July 1934, Suppl. ord. gaz. uff. no. 186 of 9 August 1934.

224. Article 101(c) of the presidential decree law n. 616 of 1977, supra n. 213. See Giampietro, supra n. 202 at 62.


226. Law no. 615, supra n. 220.

227. However, electric power plants are treated separately by the law no. 880 of 18 December 1973, Gaz. uff. no. 6 of 7 January 1974, which requires approval of construction plans by an interministerial committee, fixes special limits for electric power plant contributions to ambient sulfur dioxide concentrations and requires each electric power plant to have its own monitoring network, and by the law no. 393 of 2 August 1975, Gaz. uff. no. 224 of 23 August 1975, which involves the regions in the siting of nuclear power plants and permits government control of fuel choice and quality in fossil fuel power plants in response to fuel shortages.

228. Dente Knoepfel, et al., supra n. 7 at 63.
229. Id.

230. Article 20 of the law 615 of 1966, supra n. 220 expressly provides for the continued existence of the older classified installation system established under article 216 of the TULS of 1934.

231. For review of this jurisprudence, see Dente and Knoepfel, et al., supra n. 7, at 50-52, citing Council of State, sez. II, decision no. 589 of 17 October 1972, 96 Repertorio del Foro Italiano 2336, paragraph 79 (1973) (headnote only); Court of Cassation, VI sez. pen., decisions of 8 June 1974 and 24 May 1975, unpublished.

232. For an example in which a mayor was held to have the power under the 1934 law to order the operator of an electric power plant to prove that it was not causing unhealthful emissions, see Bruno Barel, "Lavorazioni insalubri, impianti inquinanti e poteri del sindaco," commenting on TAR Emilia-Romagna, sez. Parma, decision no. 150 of 22 May 1979, ENEL v. Comune di Piacenza et al. in 8 Le Regioni 205 (1980).

233. Article 20, law no. 615 of 1966, supra n. 220. In at least one case central authorities have intervened to define what such techniques are. The circolare of the health minister, no. 135 of 5 October 1972, provides that chimneys are to be balanced against other means of reducing ambient
concentrations in deciding what controls are to be employed by sources. Franco P. Foraboschi, "Il tecnico e la normativa contro l'inquinamento atmosferico d'origine industriale," in La disciplina giuridica della protezione contro gli inquinamenti (Atti del convegno nazionale tenuto a Bologna 18-19 April 1980) 7-21 at 15-16 (Milano, Giuffre, 1980).

234. Article 8, presidential decree law no. 322 of 15 April 1971, Supp. ord. gaz. uff. no. 145 of 9 June 1971. The pollutants are sulfur dioxide, chlorine, hydrochloric acid, fluorine, hydrogen sulfide, hydrocarbons deriving from refineries, nitrogen oxides, carbon monoxide, lead, inert suspended particles, and silicon dioxide particles. Such standards are valid only in permitting decisions for industrial sources in areas classified in A and B zones. Article 1, presidential decree law no. 1971 of 322.

235. Article 2, law no. 615 of 1966, supra n. 220 provides for the classification.

236. Article 5, presidential decree law no. 322 of 1971, supra n. 234.

237. Article 5, law no. 615 of 1966, supra n. 220.

238. See supra n. 220.
239. Presidential decree law no. 322, supra n. 234.


241. Law no. 437 of 3 June 1971, Gaz. uff. no. 169 of 8 July 1971, which receives the EEC directive of 20 March 1970 (10/220/EEC) for gasoline powered cars. Also, article 22 of the law no. 615 of 1966, supra n. 220 gives the health minister in concert with four other ministers authority to issue decrees regulating emissions from internal combustion engines. The presidential decree law n. 323, supra n. 240, setting limits on the opacity of diesel engine exhaust emissions was issued pursuant to this provision. The EEC directive 290 of 28 May 1974 has been implemented by a ministerial decree of 7 March 1975. EEC/102/77 has not been implemented. This nonimplementation may have little consequence if Italian car producers manufacture to Community standards for export purposes. EEC directive EEC/306/1972 on diesels was implemented by ministerial decree of 5 August 1974. EEC/537/1977 appears not to have been implemented. The composition of fuel for cars is controlled by the Ministry of Transportation on the basis of regulations under the presidential decree law no. 420 of 30 June 1959. The directive 78/611/EEC on the lead content of gasoline has been belatedly implemented by the presidential decree law no. 485 of 10 May 1982, Gaz. uff. no. 208 of 30 July 1982, corrected
in Gaz. uff. no. 214 of 5 August 1982. Although the implementing law was not adopted until 1982, the directive's 1981 deadline was voluntarily respected by gasoline producers. Istituto di studi e documentazione per il territorio (DOCTER), Annuario europeo dell'ambiente 73 (Milano, Airone, 1984). Regarding Community vehicle directives, see infra notes 477-485.


243. Articles 114-133, Constitution of Italy.


245. Id., article 13(8).
246. Supra n. 213.

247. Id., article 80.

248. Id., article 79.

249. Id., article 7.

250. Local efforts are limited to improving traffic flow. See e.g. Provincia di Modena, "Relazione dello stato dell'ambiente nella provincia di Modena," booklet 500 pp., 1983 at 248.

251. Law no. 880 of 18 December 1973, Gaz. uff. no. 6 of 7 January 1974; law no. 393 of 2 August 1975, Gaz. uff. no. 393 of 23 August 1975.

252. Supra n. 213, article 81.

253. Id., article 102(2).

254. Id., article 102(3).

255. Id., article 102(1).

256. Id., article 104. This confirms the division of responsibilities established by article 6.1, presidential decree law no. 322 of 1971.
257. *Id.* Article 11, decree law no. 68 of 17 March 1980, *Gaz. uff.* no. 77 of 19 March 1980, converted into law with modifications by law no. 178 of 16 May 1980, *Gaz. uff.* no. 134 of 17 May 1980, also provides that comunes have the power to inspect heating installations to insure proper maintenance and operation.

258. See Giampietro, 29, *supra* n. 202. An italian expert has written, "La c.d. legge antismog del 1966 ha dato risultati molto scarse sia per la frammentarieta delle competenze sia per le carenze di una adaguata struttura sia per la mancata previsione di un impegno finanziario sia, infine per una totale assenza di una visione globale del fenomeno." (The so called 1966 antismog law has yielded scarce results because of the fragmentation of competences, the lack of an adequate structure, the lack of financial resources, and finally the total absence of a comprehensive vision of the phenomenon.) Gianfranco Amendola, *La normativa ambientale nei paesi della Comunita Europea* 249 (Milano, Giuffre, 1975).


263. Annex to article 8, presidential decree law no. 322 of 1971.

264. Article 6, law no. 880 of 1973; articles 8, 9, law no. 393 of 1975, supra n. 227.

265. Article 3, supra n. 262.

266. Id.

267. Id.


269. Law no. 833 of 1978, supra n. 259 article 14.
270. Id., article 20.

271. Id., article 13.

272. Fuzio, supra n. 218.


275. Id.

276. Article 4, id.

277. Article 6, id.

278. Article 2, regional law no. 70 of Toscana of 24 August 1982, BU no. 49 of 31 August 1982.

279. Article 14, law no. 833 of 1978, supra n. 259.

280. Article 5, presidential decree law no. 322 of 1971, supra n. 234.

281. Id.
282. Id.

283. Article 5.4, id.

284. Although the statute is unclear (article 6(b)), article 5.3 of the presidential decree law no. 322 of 1971 confirms that the CRIA's opinion is binding on the mayor.

285. Article 217, TULS of 1934, supra n. 223; article 20, law no. 615 of 1966, supra notes 220. See supra notes 231, 232.

286. See e.g. Carlo Palmonari, "Il caso sassuolo - L'inquinamento atmosferico ed i provvedimenti di prevenzione," in La disciplina giuridica della protezione contro gli inquinamenti: Atti del Convegno Nazionale Tenuto a Bologna il 18-19 aprile 1980 113-25 (Milano, Giuffre, 1980) (describing the response to the lead, florine, and particulate pollution coming from a concentration in a small area of Emilia Romagna of 270 ceramic factories responsible for about 30% of the world production).

287. Accord, Dente, Knoepfel, et al., supra n. 7 at 185.

Predicting the ambient concentrations associated with emissions from particular sources is not an easy task. See supra chapter III n. 6.
288. Article 11.2, presidential decree law no. 322 of 1971, supra n. 234 as preserved by article 102(1) presidential decree law no. 616 of 1977, supra n. 213.

289. Article 5, law no. 615 of 1966 states that CRIA's were to consist of the following eleven people: the president of the region, the chief health officer of the region, the chief provincial medical officer of the province of the capital of the region, the regional official for public works, the local head of highway services, the director of the provincial chemical laboratory of the province of the region's capital city, a meteorological expert, the head of the regional occupation safety inspectorate, a representative of the provinces of the region, and a representative of the Chamber of Commerce of the capital city of the region together with an expert of his choice.

290. Article 101, final clause, presidential decree law no. 616 of 1977. No provisions were made for their funding.


Regional legislation has been published in regional official bulletins, which are not widely available and on occasion either incomplete or poorly indexed. A recent law requires that henceforth regional legislation also be published in the
national Gazzetta ufficiale. Article 3, law no. 839 of 11 December 1984, Gaz. uff. no. 345 of 17 December 1984. This will make subsequent regional legislation easier to find.


293. Regional law no. 70 of Toscana of 24 August 1982, BU no. 49 of 31 August 1982 (giving a nineteen member committee responsibility for air and noise pollution, but making no provision for staff).

294. Regional law no. 50 of Lazio of 29 June 1979, BU no. 19 of 10 July 1979 (establishes a regional CRIA consisting of eleven members. Its technical secretariat consists of employees in the central office of the regional government).

295. Regional law no. 28 of Veneto of 11 April 1980, BU no. 23, ediz. straordinaria, of 16 April 1980.

296. Regional law no. 20 of Liguria of 24 March 1980, BU no. 14, supp. no. 2, of 2 April 1980. This law makes the regional government responsible for authorizing the content of pollution permits given by mayors. Articles 4(d), 15. The regional government is advised by the "comitato tecnico per
l'ambiente," a modified version of the old CRIA. Article 5. Although political responsibility is a legitimating technique, it is difficult to see how politics properly enters into individual permitting decisions. It would be better for soundness purposes if the regional government limited itself to more general policy considerations, such as ensuring the existence of a functional bureaucratic organization to pass on permit requests.

297. Regional law no. 72 of Umbria of 10 December 1980, BU no. 72 of 17 December 1980 (creates Consiglio tecnico regionale per la sanità and assigns functions of CRIA to it along with other health care duties. The Consiglio has 47 members, but there is a special section for air pollution consisting of five members of which four are public officials and one is an industry representative.)


299. Article 4, id.

300. Supra n. 292.

301. Id.
302. Giampietro, supra n. 260 at 310-12, has collected some of this information.


305. Articles 13, 14, regional law no. 20 of Liguria, supra n. 296; article 2, regional law no. 21 of Emilia-Romagna of 17 August 1981, supra n. 298.

306. Trentino created the Dipartimento Ecologico Provinciale by the provincial law no. 59 of 29 November 1973, BU no. 53 of 11 December 1973, and then by the provincial law no. 47 of 18 November 1978, BU no. 60, suppl. ord. no. 1, of 28 November 1978, established emission limits for all stationary sources and a Servizio Protezione dell'Ambiente to apply them. This service, which has responsibility for water pollution as well
as air pollution, is to undertake monitoring activity and maintain an inventory of pollution sources. A commission of six technicians and public officials is to direct the service's activities with respect to air pollution. The provincial legislation was updated without changing its basic orientation by the laws no. 18 of 20 June 1980, BU no. 33 of 24 June 1980 (updating the emission limits and altering the composition of the dipartimento ecologico provinciale) and no. 1 of 11 January 1982, BU no. 4 of 19 January 1982 (making technical adjustments). See also decree of the president of the provincial government of Trento no. 6-68 of 22 February 1982, BU no. 16 of 13 April 1982 (implementing regulations).


307. See Sergio Bartole, "Il caso italiano," 1984 Le Regioni 411, 418, saying "La qualita della legislazione regionale non è molto alta e si tratta spesso di leggine concernenti minuti aspetti dell'amministrazione regionale, o di leggi di spesa, le quali in ogni caso sono state le grande risorse dei legislatori locali in difetto di iniziative più impegnative di riordino delle materie regionali." (The quality of regional legislation is not very high, and often it consists of little laws concerning miniscule aspects of regional administration, or of appropriation laws, which in any event have been the
great refuge of local legislators in the absence of more substantial initiatives directed towards reordering regional matters.)

308. Id. at 423.

309. Constitution of Italy, article 119.

310. Author's personal conversations with Italian officials.

311. See Dente, Knoepfel et al., supra n. 7; Bruno Dente, Governare la frammentazione: Stato, Regioni ed enti locali in Italia (Bologna, Il Mulino, 1985).

312. The conclusions of the study are summarized in Dente, supra n. 311 at 191-95.

313. Dente, Knoepfel, et al., supra n. 7 at 165.

314. See id. at 128.

315. Recall the agreement between the mayor of Torino and Fiat in 1966. See supra, text at n. 9.

316. Dente, Knoepfel, et al., supra n. 7 at 179-80.

317. Id. at 161-62.
318. Id. at 121.

319. Dente, Knoepfel, et al., supra n. 7 at 184.

320. Others have recognized the creativeness of the Italian judiciary in dealing with the ineffectiveness of the public administration. See e.g. The Law and Practice Relating to Pollution Control in Italy, 2d ed., supra n. 217 at 182-190.

321. For recognition of this principle by an Italian magistrate, see Giampietro 7-8, supra n. 202.


323. Article 31, code of criminal procedure.

324. Article 74, id.
325. One of the best known of the so called pretori d'assalto has written a "how to book" to explain to local citizen groups how to provoke legal actions against polluters and inactive public officials. See Amendola, supra n. 202.

326. Filippo Salvia, L'inquinamento: Profili pubblicitici 29 (Padova, CEDAM, 1984) laments the lack of attention devoted to the internal organization of the group of public prosecutors.

327. Dente, Knoepfel, et al., supra n. 7 at 192.

328. See articles 449-452, 589, 590, 639, 659, 660, and 675, code of criminal procedure.


331. Article 20, law no. 615 of 1966, supra n. 220 as modified by articles 34(h), 113, law no. 689 of 24 November 1981, Supp. ord. gaz. uff. no. 329 of 30 November 1981 (tripling the original criminal penalties).


336. Pretore Gela, supra n. 335.
337. See Amendola, supra n. 202

338. On the Court of Accounts, see Francesco Di Renzo, La Corte dei Conte (Napoli, Societa Editrice Napoletana, 1978). For discussion of the Court's activities with regard to air pollution, see Giampietro supra n. 202 at 8-21.

339. Articles 82-83, royal decree no. 2440 of 18 November 1923, Gaz. uff. no. 275 of 23 November 1923.


343. Salvia, supra n. 326 at 157-64.


345. Court of Cassation, sez. unite civili, decision no. 2 of 4 January 1980, Banco di Napoli v. Procuratore generale della

346. Article 195 Regolamento per l'amministrazione del patrimonio e per la contabilità generale dello stato, royal decree no. 827 of 23 May 1924, Supp. ord. gaz. uff. no. 130 of 3 June 1924; article 4, regolamento di procedura per i giudizi innanzi alla Corte dei Conti, royal decree no. 1038 of 13 August 1933, Gaz. uff. no. 194 of 22 August 1933.

347. Article 47, royal decree no. 1038, supra n. 346.


351. Id.

353. Articles 41 to 50, code of civil procedure.


356. For reservations about such a strategy, see Salvia, supra n. 326 at 80-83.


358. Giampietro, supra n. 202 at 72.

360. It provides, "Il proprietario di un fondo non può impedire immissioni di fumo o di calore, le esalizioni, i rumori, gli scuotimenti e simili propagazioni derivanti dal fondo del vicino, se non superano la normale tollerabilità, avuto anche riguardo alla condizione dei luoghi.

Nell'applicare questa norma l'autorità giudiziaria deve contemperare le esigenze della produzione con le ragioni della proprietà. Può tenere conto della priorità di un determinato uso."

(The proprietor of land cannot require cessation of ambient concentrations of smoke or heat, emissions, noises, vibrations and similar propagations deriving from land of a neighbor, unless they exceed the normal levels of tolerability, having regard to the condition of the surroundings. In applying this norm the judicial power must balance the needs of production with property rights. It may take account of the priority of a particular use.)

361. It provides: "Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno." (Any intentional or negligent fact which causes another an unjust damage, obliges the one who committed the fact to compensate the damage.)


366. It provides, "Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge." (Non property damage must be compensated only in the cases determined by law.).


370. Unjust damage includes injury to "il complessivo valore della persona, nella sua proiezione non solo economica e oggettiva fatta palese del patrimonio, ma anche soggettiva (biologica e sociale) . . ." Id. (the complete value of the person, not only in its economic and objective dimension made obvious by property, but also in the subjective dimension (biological and social) . . .).

371. See Salvia, supra at n. 326 at 64-73.

372. For a list of Italian environmental organizations and description of their activities, see Amedeo Postiglione, Manuale dell'Ambiente: Giuda alla legislazione ambientale (Roma, La Nuova Italia Scientifica, 1984).


374. Court of Cassation, VI sez. (criminal), decision of 15 January 1974, 98 Foro it. II, 146 (1975) (To join criminal proceedings as a civil party, Italia nostra would have to have suffered some private law property damage. Moral injury is insufficient.).


377. See e.g. Pretore di Soave, judgment of 9 May 1978, 55 Foro amm. I, 2000 (1979) (but drawing the line to exclude political parties); Amedeo Postiglione, "Soggetti legittimati a far valere il danno da inquinamento atmosferico," in 1979 Giur. merito I, 407; Franco Fiandanese, "La Tutela penale dell'ambiente. Aspetti generali," 88 Giust. pen. II, 594 (1983); Salvia, supra n. 326 at 69 n. 60 (citing three criminal cases in which Italia nostra was permitted to intervene as a civil party). Allowing private parties to participate in criminal proceedings is an accepted procedural device in Italian law if they can show damages.


379. See Amedeo Postiglione, Il diritto all'ambiente 177-82, 188-91 (Napoli, Jovene editore, 1982).


384. One author has called the delay in implementing Community norms a reflection of political backwardness. Stefano Grassi, "Parlamento, Governo, Regioni e Attuazione delle direttive Comunitarie |nel D.D.L. governativo 7 Agosto 1982|," 11 *Le Regioni* 652, 652-53 n. 3 (1983) (noting that over 100 proceedings were pending before the Court of Justice regarding Italy's delays in implementing Community directives).

385. See Antonio Tizzano, "La corte costituzionale e il diritto comunitario: vent'anni dopo . . .," 107 *Foro it.* I, 2062, 2074
See also Sabino Cassese, "La regle et les derogations: Le systeme politico-administratif italien et les directives communautaires," 1985 Revue Francaise d'Administration Publique 265.

386. See Dente, Knoepfel, et al., supra n. 7 at 202-03 (concuring in examples given).

387. Giampietro, supra n. 260 at 269.

388. See supra note 220.


393. Id.
394. Constitutional Court, decision no. 182 of 22 July 1976, 47
Rac. uff. 587, 596-97 (1976); 21 Giur. cost. 1138, 1145-46
(1976).

395. Constitutional Court, decision no. 86 of 26 July 1979, 53

396. See Dente, Knoepfel, et al., supra n. 7 at 204.

397. For a review of the Court of Justice's jurisprudence on
direct effect, see Pierre Pescatore (Judge at the European
Court), "The Doctrine of 'Direct Effect': An Infant Disease of


399. See e.g. sulfur dioxide and particulate directive, infra n.
420.

400. E.g. article 9, id.

401. Case 13/68, Salgoil v. Ministry of Foreign Trade, 1968 ECR
662.

402. Constitutional Court, decision no. 14 of 9 March 1964, Costa
v. ENEL, 19 Rac. uff. 131 (1964); 9 Giur. cost. 129 (1964).
403. Case 6/64, Costa v. ENEL, 1964 ECR 1149.


408. Constitutional Court, decision no. 182 of 22 July 1976, supra n. 394, 47 Rac. uff. at 593; 21 Giur. cost. at 1143.


410. Tizzano, supra n. 385 at 2069.


413. Court of Cassation, First civil section, decision no. 6523 of 14 December 1979, Ford italiana v. Amministrazione delle Finanze, 103 Foro it. I, 642, 648-49 (1980) (giving direct effect to Community directives on taxes having effects equivalent to tariffs).

414. Case 88/82, Amministrazione delle Finanze v. Armando and Ottavio Leonelli, 1983 ECR 1061, 1075 (provision of a directive revoking a prior regulation "applies from the date of the notification of the said directive to the Member State in question, whether or not that Member State has already adopted the necessary measures to comply with the provisions of the directive.")


417. Id. at 26.


419. See infra notes 477-484.


424. Limits have been placed on lead content of gasoline by the directive 78/611/EEC of 29 June 1978, 21 O.J. Eur. Comm. (No. L 197) 19 (1978). In 1971 Germany established a very strict lead limit on gasoline. Act of 5 August 1971, BGB 1, Part I, 7 August 1971, no. 77, p. 1234 et seq. It drew attention to the health hazards posed by lead and also aroused concern about barriers to trade. The directive sets a deadline of January 1, 1981 for member states to reduce lead content to 0.40 g/l. Article 2. Stricter standards in deference to Germany down to 0.15 g/l are allowed. Article 2. Member states are to inform the Commission of measures they take. Article 9.


429. Supra n. 425.

431. Article 2, id.

432. Id.

433. Articles 1(c), 5, id.

434. Article 7, id.

435. Italy was condemned by the Court of Justice for not having implemented the directive. Case 92/79, Commission v. Italy, 1980 ECR 1115, 1122 (noting that "a Member State may not plead provisions, practices or circumstances existing in its internal system in order to justify a failure to comply with obligations and time limits resulting from Community directives."). It has now adopted legislation to bring itself into compliance. See supra n. 220.


438. Caballero, supra n. 123 at 149.

439. Supra n. 420.

440. Article 2, id.

441. Article 2, id.

442. Article 3, id.

443. Article 15, id.

and ozone). The article 5 preference of this decision for member state transmission of data to the Commission on magnetic tape evidences an increased sophistication to the practical problems of air pollution control.

445. Article 10, supra n. 420.

446. Article 15, id.

447. Article 2 (3), supra n. 421.

448. Article 3, id.

449. Article 2, supra n. 422.

450. Article 3, id.

451. Article 4, id.

452. Supra n. 423.

453. Article 3, id.

454. Article 4, id.

455. Article 8, id.

457. Supra n. 426.

458. Article 1, id.

459. Article 3(2), id.

460. Article 3(1), id.

461. Article 4(1), id.


465. Article 6(1), id.


471. Id. at 151.

472. For lists of these committees, see 1980 Bull E.C., supplement no. 2.

473. Article 13, supra n. 420.

474. Article 9, supra n. 421.
475. Article 13, directive of 7 March 1983, supra n. 422.

476. Article 12, supra n. 420; article 9, supra n. 421; article 11, supra n. 422.


478. Directive 70/220/EEC of 20 March 1970, 3 O.J. Eur. Comm. (No. L 76 at 1) (Special English ed.) 171 (1970). The annexes of the directive establish limits on carbon monoxide and hydrocarbon emissions from motor vehicles and testing procedures to ascertain compliance with these limits. The limits imposed are those set by the Economic Council of Europe Regulation no. 15. Smeets, supra n. 430 at 396. The effect of this directive was to require a decrease in new vehicle emissions of about 40% in carbon monoxide emissions and of about 30% in hydrocarbon emissions. Id.

479. Article 5, supra n. 478.
480. Article 13(3a), supra n. 477.

481. Article 13(3b), id.

482. Article 13(3c), id.


484. Directive 78/665/EEC of 14 July 1978, 21 O.J. Eur. Comm. (No. L 223) 48 (1978). This directive reduced nitrogen oxide emissions a further 15%. Smeets, supra n. 430 at 396. Carbon monoxide emissions and hydrocarbon emissions were also reduced so that with respect to the pre 1970 unregulated state, the carbon monoxide limit was 60% less and for hydrocarbons 48% less for new cars. Id.

The Council directive 74/290/EEC of 28 May 1974, 17 O.J. Eur. Comm. (No. L 159) 61 (1974), had already provided for a further 20% reduction in carbon monoxide emissions. Smeets, supra n. 430 at 396. This directive was adopted by the Council following a negative opinion from the Committee on technical progress, which blocked its direct adoption by the Commission. Preamble, at 62, id.

introduced regulation of emissions from diesel vehicles. It is to be adjusted to technical progress by the same procedures as the directive for gasoline vehicles. Article 4, id.

The most recent directive on vehicles is directive 83/351/EEC of 16 June 1983, 26 O.J. Eur. Comm. (No. L 197) 1 (1983). It updates emission standards for gasoline vehicles and includes diesel vehicles in the framework of the directive 70/220/EEC. Because the directive involved the substantive change of including diesel vehicles in the regulatory scheme for gasoline powered vehicles, the committee procedure was not followed.


Notes - Chapter VI


3. 29 U.S.C. ss 651 et seq.

4. 29 U.S.C. s 652(8).

5. 29 U.S.C. s 655(b)(5).

6. 448 U.S. at 672.