THE LEGAL AND ADMINISTRATIVE BASIS

FOR LOCAL AIR QUALITY MANAGEMENT

Submitted By:

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I. **Overview of the Clean Air Act**

In 1955 Congress adopted the Air Pollution Control Act. Under this act the federal government’s role was mainly limited to research while the states maintained control over air pollution. The Secretary of Health, Education and Welfare (“HEW”) was the first administrator of these air programs, later that authority was transferred to the EPA. The next step Congress took was enacting the Clean Air Act (“CAA”) of 1963. This early version of the CAA gave the federal government limited authority to investigate pollution from one state that affected another state.

In 1967 Congress enacted the Air Quality Act that laid out a regulatory scheme that required:

1. air quality control regions (approximately 247) and atmospheric areas (approximately 10)
2. criteria of air quality and control techniques
3. ambient air standards within air quality regions
4. plans to implement the ambient air standards both by HEW and the states.

While states were developing ambient air quality standards the 1970 Amendments to the CAA were passed. These amendments replaced the state-by-state system of ambient air quality standards with the National Ambient Air Quality Standards (“NAAQS”).

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2. See id.
4. The current version of the CAA is codified at 42 U.S.C. §§ 7401-7671q (1999) [hereinafter referred to as CAA § __].
5. See CAA § 107(b).
7. See CAA § 108.
8. See CAA § 109.
9. See CAA § 110.
10. Rodgers, *supra* note 1, at 133.
11. See CAA § 108.
The goal of the Act was to set and achieve NAAQS in every state by 1975. The setting of maximum pollutant standards was coupled with directing the states to develop state implementation plans ("SIP") applicable to appropriate industrial sources in the state.12

The Act was amended in 1977 primarily to set new goals and designate a new timetable for reaching NAAQS since many areas of the country had failed to meet the deadlines. One of the 1977 amendments concerns the Prevention of Significant Deterioration ("PSD").13 PSD is intended to prevent areas that are cleaner than the minimum standards set by the NAAQS from having their air quality degraded, while at the same time allowing some growth.14 Every new or expanded "major emitting facility" in attainment or unclassifiable areas are required to use the "best available control technology"15 for preventing significant degradation of air pollution.16 The PSD program also establishes maximum allowable increases that limit the overall increase in pollution levels over the "baseline concentrations" in clean air areas.17 The 1990 amendments to the Clean Air Act in large part were intended to meet unaddressed or insufficiently addressed problems such as acid rain, ground-level ozone, and to implement an operating permit system known as Title V, discussed below.18

II. THE FEDERAL CLEAN AIR ACT AND THE STATES

A. State Implementation Plans: The Basis for Delegation to the States

12. See CAA § 107(a); see also Rodgers, supra note 1, at 133.
14. See id.
15. See CAA § 165(a)(4).
17. See id.
18. Rodgers, supra note 1, at 143. Rodgers explains that congressional consensus was reached on these items by relying on scientific data to set standards and trying to bring the CAA more in line with other federal environmental programs like the Clean Water Act and the Resource Conservation and Recovery Act, both of which used a permitting system. See id.
The intent of the CAA is that states will submit “implementation plans” that upon approval by the EPA allow the states to regulate air pollution within their borders. Section 110 of the CAA requires each state to submit “a plan which provides for the implementation, maintenance, and enforcement” of the primary and secondary ambient air quality standards. SIPs must include enforceable emissions limitations, provide for monitoring, and prohibit emissions that will contribute to the non-attainment of a pollutant, among other things.

B. Federal Preemption of State Regulations: Mobile Sources

As noted above SIPs allow states to regulate air pollution within their jurisdictional boundaries. However, Congress has exercised its constitutional perogative to preempt states from regulating emissions from new mobile vehicles, primarily because it is unfeasible for automobile manufacturers to design a different car for every. Section 209 of the CAA prohibits any state or local government from trying to “adopt or attempt to enforce any standard relating the control of emissions from new motor vehicles.”

C. The 1990 Clean Air Act Amendments: Title V

As previously noted, Title V is a permit program under the Clean Air Act that addresses the

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19. Standards that are based on protecting public health. See CAA § 109(b)(1).
20. Standards that are based on protecting public welfare, including the environment. See CAA § 109(b)(2).
21. See CAA § 110(a)(1). States must maintain air quality with each air quality region, or portion thereof, within the state. See id.
22. See CAA § 110(a)(2).
25. John P. Dwyer, The Role of State Law In an Era of Federal Preemption: Lessons From Environmental Regulation, 60 Law & Contemp. Prob. 203 (1997). Dwyer states that Congress has expansive powers to regulate in this area, but chooses not to since many environmental problems are local in nature and therefore are best suited to regulation from the local and state level. See id. Dwyer does note that states’ roles in environmental regulation has grown more limited since the EPA’s inception. See id.
26. See CAA § 209(a).
27. Florida also preempts local governments in certain areas. See Fla. Stat. ch. 403.061 (1998) which prohibits local governments from adopting “any local ordinance, special law, or local regulation requiring the installation of Stage II vapor recovery systems, . . . unless [the local government] is or has been . . . [an] ozone non-attainment area.”
following sources:

1. **affected sources**: §402 of the CAA defines them as facilities that are subject to emissions reduction or limitation requirements of sulfur dioxide28;  
2. **major sources**: any stationary source or group of stationary sources within a contiguous area under common control that emits or has the (controlled) potential to emit at least 10 tons per year or any hazardous air pollutant or at least 25 tons per year of any combination of hazardous air pollutants29, or any stationary source or source of air pollutants which emits or has the controlled30 potential to emit at least 100 tpy of any air pollutant31;  
3. any other source subject to regulation under §§7411 or 7412,32  
4. any source required to have a permit under part C or D of subchapter I of the CAA (part C addresses PSD requirements33 and part D addresses the regulations of sources in non attainment areas34); or  
5. any other stationary source in a category designated by regulations promulgated by the Administrator.35

1. **The Federal Title V Permit Shield**

A permit under Title V shields permitted sources from all other requirements under Title V and from any other requirements so long as those requirements are incorporated into the permit or the permitting authority concludes that other provisions do not apply.36

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28. See CAA § 402(2).
29. See CAA § 112(1).
31. See CAA § 302(j).
32. See CAA § 502(a).
33. See CAA § 160.
34. See CAA § 171(2).
35. See CAA § 502.
36. See CAA § 504(f).
In order to alleviate part of the burden of the CAA that states bear, the Federal Government allocates funds for air programs for the EPA to distribute under §103 and §105. To encourage state participation in research for the control of air pollution the EPA is authorized to give grants to air pollution control agencies.\textsuperscript{37}

Section 105 of the CAA allows the Administrator of the EPA to give grants to state air programs and to local governments “charged with the responsibility for enforcing“ air quality regulations\textsuperscript{38}. The Administrator may give grants up to the amount of three-fifths the cost of implementing\textsuperscript{39} the program.\textsuperscript{40} The implementing agency must allocate at least the same amount of nonfederal monies each fiscal year for the air program, unless the EPA Administrator determines that the implementing agency has made across the board cuts in executive agencies.\textsuperscript{41}

Each state receives an allotment\textsuperscript{42} of federal funds, though the allotment is not an entitlement.\textsuperscript{43} A state might only receive a portion of its allotment. The remaining portion is “set-aside” for use by the EPA to cover the cost of any federal implementation plan that the EPA determines is necessary due to the state failing to meet its obligations under the CAA.\textsuperscript{44}

\section{Implementation of the Clean Air Act in Florida}

\textsuperscript{37} See CAA § 103.
\textsuperscript{38} See CAA § 105 and § 302(b)(3).
\textsuperscript{39} See CAA § 105(a)(1)(A) which defines implementing to include the costs of establishing an air program. This section implies that § 105 funds are available before a local program has approval, since program approval can only occur after a local program has been established, but the federal regulations require the Regional Administrator to consult with the state agency before issuing § 105 grants to a local program. \textit{See} 40 C.F.R. § 35.215(b) (1999). It appears to be DEP’s policy to not approve § 105 grants for establishing local air programs since none of Florida’s current local air programs received § 105 grants until after the programs were established. \textit{See} discussion \textit{infra} Section V. L. and the matrix in the appendix.
\textsuperscript{40} See CAA § 105(a)(1)(A).
\textsuperscript{41} See 40 C.F.R. § 35.210(a) (1999).
\textsuperscript{42} Although the actual awarding of the grant is discretionary, at least .5% of total money available for § 105 grants and no greater than 10% of such money shall be available for each state to apply for. \textit{See} 40 C.F.R. § 35.115(a) (1999).
\textsuperscript{43} See 40 C.F.R. § 35.105 (1999).
\textsuperscript{44} See 40 C.F.R. § 35.110(d) (1999); see also \textit{Illinois Environmental Protection Agency v. United States Environmental Protection Agency}, 947 F.2d. 283, 291 (7th Cir. 1991) where the court finds that the US EPA’s set-aside policy outlined in 40 C.F.R. §110 did not violate the CAA. \textit{See id.}
A. Florida’s State Implementation Plan

Florida has an approved state implementation plan, pursuant to §110 of the CAA. The state implementation plan is a conglomeration of regulations that the state submitted for approval under §110 of the CAA. Florida continuously revises the SIP in order to meet the revised standards that the EPA issues. The Department of Environmental Protection ("DEP") must give notice to any affected air quality control region of any proposed SIP revision.45

The heart of Florida’s SIP statutory authority is found in Chapter 403, Florida Statutes, “Environmental Control”, while most of the rules for the plan are laid out in Title 62 Department of Environmental Protection, Chapter 62-204 Air Pollution Control - General Provisions or the Florida Administrative Code.

As stated earlier, the CAA requires the EPA Administrator to designate Air Quality Control Regions.46 Those regions can be interstate, as well as intrastate.47 Each region encompasses many political subdivisions, such as counties, or portions thereof.48 In Florida there are six Air Quality Control Regions.49 The designated regions are the Central, West Central, Southeast, and Southwest Florida Intrastate Air Quality Control Regions and the Jacksonville (Fla.)-Brunswick (Ga.), and the Mobile (Al.)-Pensacola-Panama City (Fla.) - Southern Mississippi Interstate Air Quality Control Regions. Alachua County is located in the Jacksonville (Fla.) - Brunswick (Ga.) Interstate Air Quality Control Region.50

Air Quality Control Regions, or portions thereof, are used to determine whether an area is in attainment, non-attainment, or unclassifiable for national primary and secondary air quality

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46. See CAA § 107.
47. See id. at § 107(c).
48. See 40 C.F.R. § 81.21 (1999) which delineates the San Francisco Bay Area Intrastate Air Quality Control Region which only includes a portion of Solano County.
49. See Appendix A to Part 81 - Air Quality Control Regions.
Florida bases attainment status on portions of regions, typically looking at a whole county, but sometime even smaller areas.  

B. State Implementation of Title V 

1. The State Permit Shield

In 1995 Florida began regulating Title V sources. Section 403.0872 of the Florida Statutes requires each major source of air pollution to obtain a permit from DEP. DEP incorporates the federal definitions of regulated facilities into its own provisions. Whereas the federal permit shield only specifically shields the permittee from other CAA standards that are listed in the permit, the state permit shield also provides protection from local standards, from locally approved programs, that are designated in the permit.

C. State Implementation of Non-Title V Sources

The owner of any facility which could reasonably be expected to emit any air pollution must obtain a permit from the DEP before “beginning construction, modification, or initial or continued operation” unless exempted. While Title V permits cover most large facilities, there are still a number of facilities that receive non-title V permits from DEP. These are typically smaller facilities that are under the Title V thresholds described in section II.C. above. These facilities are permitted under Florida’s SIP. General conditions of non-title V air operating permits require the types and

51. See CAA § 161.
52. Therefore if Jacksonville is non-attainment for ozone, Alachua County may be attainment, even though they are in the same air quality control region. See Fla. Admin. Code Ann. r. 62-204.340(3)(b)(4) (1999) which designates the Southwest corner of Pasco County as unclassifiable for sulfur dioxide, but not the whole region that Pasco County is in.
56. See id.
57. See Fla. Admin. Code Ann. r. 62-210.300 (1999). There are federally enforceable non-title V permits. These generally include facilities where the owner has requested federal enforcement or the facility is a synthetic non-title V facility. Synthetic non-title V facilities are ones that would be Title V facilities but for the actions of the owner which artificially limit the emissions (such as restricting the hours of operation). See Fla. Admin. Code Ann. r. 62-210.200(238) (1999).
amounts of emissions to be specified and require that facility owner to maintain pollution control equipment, as specified. 58 The SIP does provide a few categorical exemptions from permitting requirements for such “facilities” as small generators, vacuum pumps in laboratory operations, and equipment used for steam cleaning. 59

While the SIP lays out the basis for controlling air pollution in Florida, local governments can take on part of this role through the establishment of local air programs. Local programs must, as a minimum, follow the standards laid out in the SIP.

58. See id. at 62-210.300(2)(a).
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examining the sources of authority for local air quality management.
IV. SOURCES OF AUTHORITY FOR LOCAL AIR QUALITY MANAGEMENT IN FLORIDA

This report analyses the sources of legal authority for local air quality management in Florida. Section A discusses local home rule authority to regulate air quality in Florida. Section B analyses *Florida Rock v. Alachua County*’s interpretation of the source of authority to create a pollution control program. Section C discusses the statutory guidelines for creating an approved local program.

The remaining sections address legal information pertinent to the creation of a local pollution control program. Section D explores the possibility of establishing stricter air quality standards than those required by the State of Florida. Section E discuss exceptions to local pollution control program delegation. Section F briefly examines the Florida Title V permit shield provision and the implications of the permit shield on a local pollution control program in the presence and absence of DEP approval. Finally, section G presents the major sources which have been preempted from local pollution control programs and addresses the potential effects of these source preemptions on local pollution control programs.

A. Local Home Rule Authority

The authority for regulation of air quality in Florida stems from the constitutionally derived Home Rule prerogatives of local government and the statutes implementing home rule, and from specific authority that may be delegated by the DEP pursuant to Section 403, Florida Statutes. However, the recent case of *Florida Rock v. Alachua County* suggests that the county can not rely on its Home Rule authority to implement local pollution control programs.

Article VIII Section 1 (g) of the Florida Constitution and the executing statutes, Sections

60. 721 So. 2d 741 (Fla. Dist. Ct. App. 1998).
125.01 Florida Statutes (1997), \textsuperscript{61} gives counties Home Rule Authority to protect the “health, safety, welfare and morals of their citizens.”\textsuperscript{62} In addition, Article VIII Section 2(b) of the Florida Constitution and the executing statute, Section 166.021 Florida Statutes (1997) gives counties all the power of a municipality.\textsuperscript{63} Counties have exercised their home rule and municipal powers pursuant to Sections 125.01\textsuperscript{64} and 166.021\textsuperscript{65} Florida Statutes (1997) respectively, to promulgate rules that control local pollution.\textsuperscript{66} For example, some counties have local ordinances that prohibit or regulate burning.\textsuperscript{67}

Alachua County is a charter county and consequently possesses all inherent powers of local self-government available under Article VIII Sections 1(g) and 2(b) of the Florida Constitution, and its implementing legislation to regulate air pollution within Alachua County.\textsuperscript{68} However, the recent case of \textit{Florida Rock v. Alachua County} has stated that the County cannot rely on local Home Rule as an independent source of authority to regulate sources of air pollution.\textsuperscript{69}

\textbf{B. \textit{Florida Rock v. Alachua County}}

Section 403.182 may preempt a county’s Home Rule authority under Section 125.01, Florida Statutes. Even though Chapters 166 and 125\textsuperscript{70} empower counties to create air pollution

\begin{footnotes}
\item[61] FLA. STAT. ch. 125.01 (1997).
\item[62] City of Miami v. City of Coral Gables, 233 So. 2d 7, 10-11 (Fla. 3d DCA 1970) (stating that regulating discharge of pollutants into the atmosphere bore a relationship between public health and welfare).
\item[63] Florida Municipal Home Rule Powers Act, FLA. STAT. ch. 166.021 (1997); see also \textit{State ex. rel. v. Dickinson v. Volusia County}, 269 So. 2d 41 (Fla. 1972) (holding that a charter county also possess all powers of a municipality).
\item[64] FLA. STAT. ch. 125.01(1) (1997).
\item[65] FLA. STAT. ch. 161.021 (1997).
\item[66] Moreover, FLA. STAT. ch. 125.275 (1997) creates specific authority for counties designated as non-attainment areas to control local air pollution.
\item[67] \textit{See, e.g.}, Rules of the Environmental Protection Commission of Hillsborough County Ch.1-4 Open Burning. That county states the intent of the ordinance is to insure the atmospheric purity of the air in Hillsborough County.
\item[68] Alachua County Home Rule Charter, Article I Section 1.1 states : “Alachua County shall be a home rule charter county, and except as may be limited by this home rule charter, shall have all county and municipal powers of self-government . . . .”
\item[69] 721 So. 2d at 743.
\item[70] \textit{See} ch. 125.01.
\end{footnotes}
control ordinances, the First District Court or Appeal’s decision in *Florida Rock v. Alachua County* could be interpreted as invalidating local government implementation of pollution control ordinances that have not been approved by DEP.

The First District Court of Appeal in *Florida Rock* addressed the effectiveness of a local air program in the absence of DEP approval. Florida Rock sought to overturn the ruling by the court below which upheld the constitutionality of Alachua County’s citizen initiative-based Clean Air Ordinance. Florida Rock argued that the ordinance set stricter air quality standards than those required by the state and that the County’s air pollution control program had not been approved by the DEP. The Court agreed but ruled this did not affect the ordinance’s ability to be included on the ballot, only its implementation. In its opinion, the *Florida Rock* court went on to address whether a local pollution control ordinance requires DEP approval pursuant to Section 403.182, Florida Statutes.

In its analysis of whether the proposed ordinance was invalid without DEP approval, the First District Court of Appeal rejected the argument that the county had inherent “home rule” power to establish an independent, local public ordinance. The *Florida Rock* court concluded that the plain meaning of section 403.182(1), Florida Statutes established that the “ordinance may not, either standing alone or as part of a local pollution program, be effective in the absence of approval from DEP.”

The absence of DEP approval did not affect the outcome in *Florida Rock* since DEP could

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71. 721 So. 2d at 742-743..
72. Id.
73. See id. at 742.
74. See id.
75. See id.
76. Id. at 742-743.
77. See id. at 743.
78. Id.
have eventually approved the ordinance as a part of a local air program. However, the First District Court of Appeal’s opinion has raised serious questions concerning the validity of various local pollution control ordinances and programs to the extent that they have not received delegated authority the DEP.

C. Delegated Local Pollution Control Programs

Section 403.182, Florida Statutes (1997) provides a statutory means by which the DEP delegate regulatory authority to local government pollution control programs. The DEP has not promulgated rules interpreting Section 403.182, Florida Statutes; however, the DEP has developed a guidance memorandum which interprets the statute. This DEP guidance establishes procedures by which local air pollution programs receive DEP approval.

Subsections 403.182 (1) and (2) of the Florida Statutes (1997) provide:

(1) Each county and municipality or any combination thereof may establish and administer a local pollution control program if it complies with this act. Local pollution control programs in existence on the effective date of this act shall not be ousted of jurisdiction if such local program complies with this act. All local pollution control programs, whether established before or after the effective date of this act, must:
(a) Be approved by the department as adequate to meet the requirements of this act and any applicable rules and regulations pursuant thereto.
(b) Provide by ordinance, regulation or local law for requirements compatible with, or stricter or more extensive than those imposed by this act and regulations issued thereunder.
(c) Provide for the enforcement of such requirements by appropriate administrative and judicial process.
(d) Provide for administrative organization, staff, financial and other resources necessary to effectively and efficiently carry out its program.

(2) The department shall have the exclusive authority and power to require and issue permits; provided, however, that the department may delegate its power and authority to local pollution control organizations if the department finds it necessary or desirable to do so.

79. Id.
80. FLA. STAT. ch. 403.182 (1997).
Subsection 403.182 (1)(a) states that in order to be approved, the DEP must determine that the program is adequate to meet the requirements of the act. Statutory guidelines for adequacy of a local pollution control program are established in Subsections 403.182 (1) (a) to (d). Once the requirements under Section 403.182 (1) (a) through (d) are met then the county air pollution control program is deemed adequate and the DEP will approve the local air pollution control program. Section 403.182 (1) of the Florida Statutes presents three requirements that local pollution control programs must meet to receive DEP approval. First, local regulations must be “compatible with, or stricter or more extensive than” those of the state. Second, local pollution control programs must use “appropriate administrative and judicial processes” to enforce local regulations. Third, local air programs must have the resources necessary to carry out its program in an effective and efficient manner.

The DEP guidance states that the Secretary of the DEP (“Secretary”) determines whether the county air pollution control program is adequate. Through its interpretation of Section 403.182, the DEP guidance has articulated a list of criteria that the Secretary will consider to determine whether the local air pollution control program is adequate. The Secretary will consider:

- the effectiveness of the administrative organization and management of the county’s air pollution control program
- the capability of the program’s staff, including the number of staff hours committed to air pollution control functions and the staff’s experience and training in air pollution control.
- the level of county funding for the county’s air pollution control activities and any other

82. Ch. 403.182.
83. Id. at subsection (1)(b).
84. Id. at subsection (1)(c).
85. Id. at subsection (1)(d).
86. See DARM-OGG-04.
87. See DARM-OGG-04.
financial resources available, excluding vehicle license registration fees. 88
· the appropriateness and mechanisms for enforcement of local ordinances or laws related to air pollution control in the county and
· the nature and scope of the county's current air pollution control activities, especially those related to mobile source emissions, toxic and odorous emissions, air quality monitoring and facility inspections. 89

D. Authority for Stricter Local Standards

Subsection 403.182(1)(b), Florida Statutes, allows counties and municipalities of the State of Florida to establish stricter or more extensive standards than those imposed by the state. 90

Subsequent subsections of 403.182, Florida Statutes address compliance with, and exemptions to, established stricter standards.

Subsection 403.182(6) of the Florida Statutes states that if the local pollution control program adopts stricter standards then the DEP will enforce those standards in that county. 91

Florida Statute Subsection 403.182(7) provides that any facility which fails to comply with the more stringent regulations adopted by the approved local pollution control program is subject to the civil and criminal penalties under section 403.161 of the Florida Statutes. 92

E. Exceptions to Section 403.182 Local Program Delegation

If any local program changes its rules, whether or not the rules apply stricter standards than those adopted by the department, Subsection 403.182 (7), Florida Statutes dictates that such changes shall not apply to any installation or source which is operating under a valid operating permit at the time of the change. 93 Thus subsection 403.182 (7) of the Florida Statutes provides a temporal preemption to Title V facilities that have received their Title V operating permit and are

88. See id.
89. See id.
90. Ch. 403.182 (1)(b).
91. Id. at subsection (6).
92. Id. at subsection (7).
93. See id.
actually operating at the time of the change in regulations. While this provision may exempt operating facilities from stricter standards imposed during the permit period, when the facility applies for renewal of the Title V operating permit the stricter standards may be incorporated into the permit and those facilities would have to comply with those standards.

More recently, section 403.182(8) was amended to provide additional spatial and temporal exemptions from local regulation of installations and sources of emissions. Subsection 8 specifically exempts any installation and source which was already permitted or was under construction from a specified date, May 1, 1997 and in a specified geographical location, north of the Cross Florida Greenway. This provision was challenged on the grounds that it did not apply to the entire state of Florida and appeared to be a special law.

F. Unapproved Local Programs and the State Title V Permit Shield

Unlike the federal shield which does not refer to local standards, the Florida Title V statute expressly shields permittees from local standards, except to the extent that those standards are incorporated into the Title V permit. Florida’s Title V permit shield statute, section 403.0872(15) of the Florida Statutes states that “[a]ny permittee that operates in compliance with an air-operation permit under this section is deemed to be in compliance with applicable permit requirements of the Clean Air Act and all implementing state, local and federal air pollution control rules and regulations and all provisions of this chapter relating to air pollution, and rules adopted thereunder.”

Thus if a local ordinance seeks to regulate air pollution in the absence of a DEP approved

94. See id.
95. Id. at subsection (8).
96. Id.
97. An Alachua Circuit Court dismissed the case because it was not “ripe” for adjudication.
98. See CAA § 504(f).
local program, the local standards may not apply to stationary sources which have received a Title V permit. The DEP’s current practice is to incorporate into its permit only those standards set by DEP-approved local programs. Also, the permittee would be made to comply with those standards as they would be incorporated into the Title V permit. By contrast, standards set by unapproved programs will not be incorporated into a Title V permit and consequently are unenforceable as against the permittee.

G. Source Preemptions

1. Electrical Power Plants

The state of Florida preempts a variety of sources of air pollution from local government regulations. The state, under governance of the DEP, directly regulates the construction, permitting and operation of these sources.\(^\text{100}\) Florida Statutes sections 403.510 and 403.511, regulate electrical power plants and the siting of transmission lines, respectively.\(^\text{101}\)

Section 403.510(1) of the Florida Statutes authorizes the state to preempt any conflicting law, rule or ordinance promulgated by counties or municipalities that regulates electrical power plants.\(^\text{102}\) The state also preempts the regulation and certification of electrical power plant sites and electrical power plants pursuant to section 403.510 (2) of the Florida Statutes.\(^\text{103}\) All major source air operation permit applications for certified power plants are governed by the DEP.\(^\text{104}\) The DEP cannot change conditions of certification for construction of new electrical generation plant applications has acted.\(^\text{105}\)

\(^{100}\) See Fla. Stat. ch. 403.510 and 403.511 (1997).
\(^{101}\) Ch. 403.510 and 403.511.
\(^{102}\) Ch. 403.510(1).
\(^{103}\) Id. at subsection (2).
\(^{104}\) See ch. 403.0872.
2. Other Major Sources

Section 403.0872(14) of the Florida Statutes prohibits local pollution control programs from issuing permits to certain major sources of pollution. In order to ensure consistency, Florida Statute section 403.0872 (14) provides for statewide permitting of sources that belong to Major Group 26, Paper and Allied Products. In addition, sources that belong to Major Group 28, Chemicals and Allied Products and sources that belong to Industry Number 2061, Cane Sugar industry (with the exception of refining) may only be permitted by the state. Any approved local pollution control program that has received permitting delegation from the DEP would be unable to permit these major sources.

These source preemptions have potential adverse affects on the funding of local pollution control programs. The inaccessibility to fees collected from these major sources have potential adverse impacts on the establishment and maintenance of DEP-approved local air pollution control programs.

A county with an approved local program that also has a major preempted source of air pollution within its jurisdiction cannot collect annual operation licensing fees from that facility. Yet funds from these major sources could be used to ensure that local air pollution control programs have adequate staff to conduct the monitoring, enforcement and permitting duties required by the DEP once approval has been received. In addition, funds received from major sources would help ensure against revocation of DEP approval for failure to maintain sufficient financial resources to effectively support a local air pollution control program.

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106. Ch. 403.0872(14).
107. Id.
108. Id.
109. See DARM-OGG-04.
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analyzing the administration of local air pollution control programs.
V. ADMINISTRATION OF LOCAL AIR POLLUTION CONTROL PROGRAMS IN FLORIDA

In light of a recent decision by the First District Court of Appeal, it may be that the only way a local government can lawfully regulate air pollution is through a local air pollution control program approved by DEP pursuant to Fla. Stat. ch. 403.182. This report was drafted to assist counties that seek to regulate primarily stationary sources of air pollution within their borders by illustrating how eight Florida counties are currently administering DEP-approved local air pollution control programs (“APCPs”).

Section A of this report paints a macro-level picture of the counties with APCPs, by comparing such characteristics as population, land area, revenues, and air quality status. Section B investigates the sources of authority that underlie the APCPs. Section C examines the degree to which the counties have received delegated authority from DEP. Section D highlights the major steps and criteria of the DEP approval process. Section E explores the extent to which approved APCPs have implemented standards that are either (1) stricter than state or federal rules or (2) regulate areas for which there are no defined state or federal standards. Section F addresses the due process requirements for APCPs that issue state permits. Finally, Section G details sources of funding that are available to APCPs.

A. Characteristics of Counties with Air Pollution Control Programs

Eight counties (Broward, Miami-Dade, Duval, Hillsborough, Orange, Palm Beach, Pinellas, and Sarasota) currently have APCPs that are approved by the Florida Department of Environmental Protection under Fla. Stat. ch. 403.182.110 These counties range in population from 311,000

110. Fla. Stat. ch. 403.182(1) (1997) provides, in pertinent part: “All local pollution control programs . . . must: (a) be approved by the [D]epartment [of Environmental Protection] as adequate to meet the requirements of this act and any applicable rules and regulations pursuant thereto.”
(Sarasota) to 2,070,600 (Miami-Dade), \(^{111}\) and cover land areas from 309 square miles (Pinellas) to 2,578 square miles (Palm Beach). \(^{112}\) In terms of finances, the counties generate anywhere between $379 million (Sarasota) and $5.11 billion (Miami-Dade) per year in total revenues. \(^{113}\)

These eight counties have a variety of air pollution problems. Seven of them have previously held the classification of ozone nonattainment area, \(^{114}\) and are currently designated “air quality maintenance areas” for ozone. \(^{115}\) In addition, Hillsborough and Duval Counties are “unclassifiable” for sulfur dioxide, \(^{116}\) and parts of those counties are designated “air quality maintenance areas” for particulate matter. \(^{117}\) Hillsborough County also has some locations that are designated “air quality maintenance areas” for lead. \(^{118}\)

These air quality problems are caused by varying mixes of mobile and stationary sources. Generally, ozone is a by-product of vehicular emissions, so it is not surprising that six of the seven counties with an “air quality maintenance area” designation for ozone have over 1,000 registered vehicles per square mile. \(^{119}\) By contrast, Sarasota and Alachua Counties, which are in compliance for ozone, have 722 and 233 registered vehicles per square mile, respectively.

In terms of stationary sources, the number of facilities that meet the threshold for Title V major source permits varies widely by county, from zero in Sarasota County to approximately forty-
five in Hillsborough County. Though comparable data regarding lesser facilities was not available for all counties, it appears that each county has between 150 and 400 facilities that fall under a Title V general permit or a state or local permit. The exception is Miami-Dade County, which has the most extensive permitting program – it manages 4,300 permits.

Clearly, many counties adopted their air programs to address serious air pollution problems. However, at least one county adopted its program to address air quality before it became a problem. One rationale for adopting a local air program is to provide greater resources to air pollution control than the state will allocate. For example, one county explained that it had approximately the same number of staff persons dedicated to air as the DEP District Office (which has jurisdiction in over a dozen counties). Accordingly, because it has more representatives per square mile, the county believes it can more effectively monitor ambient air quality, investigate citizen complaints, issue permits, and enforce permit limitations.

B. Local Air Program Sources of Authority

All eight counties with APCPs have home rule charters. Still, seven of the eight APCPs (all except Miami-Dade’s) are operated by entities that were created or authorized pursuant to special acts of the legislature. Of those seven entities, four (Broward, Orange, Hillsborough, and Duval) were originally created or authorized before the 1968 constitutional revisions gave counties “home rule” authority, and another (Palm Beach) was authorized in 1970, before the

120. Telephone Interview with Susan Cameron, Special Projects, Sarasota County Pollution Control Division (Mar. 9, 1999); Telephone Interview with Leroy Shelton, Hillsborough County Environmental Protection Commission (Mar. 10, 1999).
121. Telephone Interview with H. Patrick Wong, Chief, Air Quality Management Division, Miami-Dade County Department of Environmental Resources Management (Apr. 19, 1999).
122. Miami-Dade County’s program is administered by an agency that was created pursuant to Miami-Dade County’s constitutional home rule powers.
123. For Broward County, see 1965 Fla. Laws ch. 1338; for Duval County, see 1965 Fla. Laws ch. 1474; for Hillsborough County, see 1967 Fla. Laws ch. 1504; for Orange County, see 1967 Fla. Laws ch. 1830.
legislature executed “home rule” through amendments to Fla. Stat. ch. 125. In the pre-home rule era, county authority was restricted to powers expressly granted by the legislature. As such, before 1971, authorization by special act of the Legislature was the only way a county could allocate resources to air pollution control.

At the time of this writing, this author was not able to determine why the remaining counties’ APCPs were authorized by special act, rather than simply created under the authority of Fla. Stat. ch. 125(1)(j), which provides “[t]he legislative and governing body of a county shall have the power to . . . [e]stablish and administer programs of . . . air pollution control . . . .” However, even though no authority requires it, the fact that seven of eight of the currently operating APCPs draw their authority from special acts suggests that a county that seeks to initiate a local air pollution control program should consider basing the authority of that program on a special act.

C. The Nature of Delegated Authority

Generally, DEP delegates three functional categories of activities to APCPs: monitoring, compliance, and permitting. A functional delegation from DEP includes responsibility for all pollutants regulated by DEP. In other words, DEP will not approve a local air pollution control program that only addresses a limited number of these pollutants. Still, even if DEP does not approve a local air pollution control program, it may contract with a county to perform a task such as ambient air quality monitoring.

According to the Division of Air Resources Management (DARM) guidance memo DARM-OGG-04, APCPs must, at a minimum, take a lead role in monitoring and compliance activities, and

125. The “home rule” provision of Article 8 § 1 of the 1968 Constitution was not self-executing. In other words, the legislature had to pass a law to implement the provision. The legislature executed the provision in 1971 through substantial amendments to FLA. STAT. ch. 125.

126. See DARM-OGG-04, Part V; see also Air Pollution Control Specific Operating Agreement between the State of Florida Dept. of Env. Prot. and the City of Jacksonville Reg. and Env. Svcs. Dept. Air and Water Quality Div., Part III(1) (Jul. 29, 1997).
provide staff to comment on permit applications. APCPs must also cooperate with DEP on mobile source emissions control, although local governments generally have no regulatory power in that arena. Beyond the minimum requirements, DEP has the statutory authority to almost completely delegate monitoring, compliance, and permitting functions to a local air program.

Currently, six of the eight APCPs (Broward, Miami-Dade, Duval, Hillsborough, Palm Beach, and Sarasota) have near-complete delegation of monitoring, compliance, and permitting functions. The other two programs (Orange and Pinellas) have a lead role in monitoring and compliance, and provide comments on permit applications. It appears that most APCPs start with the minimal delegation of authority and expand over time to include permitting authority.

D. The DEP Approval Process

The DEP local pollution control program approval process is set forth in a guidance memo, DARM-OGG-04. Essentially, the guidance memo gives some specificity to the provisions of Fla. Stat. ch. 403.182, and details the state funding formulae for APCPs.

The process begins when a county files a petition with the Secretary of DEP. Then, after publishing notice in the Florida Administrative Weekly, DEP examines the air pollution control program’s organizational and management effectiveness, staff capabilities, and the nature and scope of its current operations, as well as the county’s funding commitment, ordinances, and enforcement mechanisms.

127. See DARM-OGG-04.
128. See DARM-OGG-04 and “The Clean Outdoor Air Law,” FLA. STAT. ch. 325.201 et seq. Note that Miami-Dade County implemented ordinances in 1985 that govern mobile source emissions and authorize enforcement through routine traffic stops. However, since the adoption of the state program in 1991, Miami-Dade has chosen not to enforce its own mobile source ordinances, but instead to implement the state program.
   Also note that, though generally counties are pre-empted from mobile source regulation by the Clean Outdoor Air Law, a county may opt in to the vehicle inspection program under FLA. STAT. ch. 325.204 by a majority vote of its commissioners.
129. See FLA. STAT. ch. 403.182(2) (1997).
130. The county funding commitment requirement specifically excludes auto tag fee revenues generated pursuant to FLA. STAT. ch. 320.03(6).
131. See DARM-OGG-04, Part IV(3).
DEP will not approve a local air pollution control program until: (a) it “has demonstrated its ability to adequately administer the appropriate parts of Chapter 403, Florida Statutes, and the air pollution control rules of the Department, within the county;” (b) the county has entered into a specific operating agreement with DEP, outlining the responsibilities of the county and DEP; and (c) the county enacts appropriate air pollution control ordinances or regulations. After the county has met these criteria, it must publish in a local newspaper a notice of proposed agency action on the petition, and submit proof of publication to DEP. DEP will then wait at least 14 days to take action on the petition.

DARM-OGG-04 was written under the assumption that local governments have home rule power that extends to air pollution control. Specifically, DEP will not approve a local air pollution control program until the local government implements it and demonstrates that it is effective. Yet, recently, in Florida Rock, the First District Court of Appeal stated that a county air pollution ordinance “may not, either standing alone or as part of a local pollution program, be effective in the absence of approval from DEP.”

The Florida Rock decision thus creates a “chicken and egg” problem for local governments that wish to seek DEP approval for a local air pollution control program. Put simply, the next local government that seeks DEP approval for a local air pollution control program may find itself litigating the issue as to whether local air pollution control program implementation may come before DEP approval.

E. Local Air Quality Standards

APCPs may set standards for air pollutants that are stricter than those set by the federal and

132. See id. at Part IV(4).
133. 721 So. 2d at 743.
They may also set standards for pollutants that are not covered by the Clean Air Act or DEP regulations. In the former case, DEP will enforce stricter local standards in place of its own standards. However, DEP will not step in to enforce standards for pollutants that are not normally regulated by the state.

Of the eight counties with APCPs, five (Broward, Orange, Hillsborough, Miami-Dade, and Pinellas) enforce some standards that are stricter than their federal and state counterparts. For example, Broward County’s stricter standards apply to particulate matter (“PM”), hydrochloric acid (“HCl”), and sulfur dioxide (“SO₂”) emissions from biohazardous waste incinerators (“BWIs”). Orange County also has stricter requirements for PM emissions from BWIs. Moreover, due to a great excess of incineration capacity, Orange County requires potential operators to obtain a certificate of need prior to construction of a BWI facility. Like Orange and Broward Counties, Palm Beach County also has stricter regulations for BWIs. Palm Beach County not only has more stringent requirements for PM, but also for heavy metals, dioxins, and opacity of BWI emissions.

Hillsborough County’s strict standards for SO₂ and nitrogen oxide (NO₂) emissions from fossil fuel steam generators (power plants) have been incorporated into 62 Fla. Admin. Code 296.405 and 296.406. Hillsborough County also prohibits weak nitric acid plants from producing visible emissions (the state standard is 10% opacity), and requires trucks that load liquid petroleum...
products to be vapor-tight.\textsuperscript{142} Similarly, Miami-Dade and Pinellas County have stricter standards for stage 1 and stage 2 fuel vapor recovery systems, respectively. Finally, Pinellas County has stricter standards for asbestos.

All eight counties regulate a variety of pollutants for which the state and federal governments do not have defined standards in place.\textsuperscript{143} For example, Palm Beach County regulates dioxin and heavy metals emissions from biohazardous waste incinerators. Additionally, all of the counties regulate one or more of the following: open burning, noise, and objectionable odors.

\textbf{F. Procedural Due Process: Appeals of Permit Denials}

For major sources of air pollution,\textsuperscript{144} Fla. Stat. ch. 403.0872 sets the standards for procedural due process. That statute provides that major source operating permits (except general permits) are subject to the Florida Administrative Procedure Act (“FAPA”),\textsuperscript{145} except insofar as FAPA is inconsistent with Chapter 403.0872’s own procedures. Generally, administrative review occurs at the draft permit stage.\textsuperscript{146} Following the administrative hearing, the hearing officer’s comments are incorporated into the proposed permit, which is reviewed by the EPA.\textsuperscript{147} After the EPA approves the permit, judicial review in circuit court is available under Fla. Stat. ch. 120.68.\textsuperscript{148}

For other state delegated permits, Fla Stat. ch. 403.90(b)(2) provides that administrative review under Fla. Stat. ch. 120 is available to “determin[e] whether the action is in accordance with existing statutes or rules and based on competent substantial evidence . . . .” People who are substantially affected by an agency’s decision on a permit may “seek review within 90 days of the rendering of such decision and request monetary damages and other relief in the circuit court . . . .”

\textsuperscript{142} See 1 Rules of the Environmental Protection Commission of Hillsborough County 3.63.
\textsuperscript{143} For the purposes of this analysis, a “nuisance” standard is not a “standard.”
\textsuperscript{144} Though not stated explicitly in the statute, it appears these major sources are Title V sources.
\textsuperscript{145} See Fl. Stat. ch. 120 (1997).
\textsuperscript{146} See Fl. Stat. ch. 403.0872(6).
\textsuperscript{147} See id at subsections (7) & (8).
\textsuperscript{148} See id. at subsection (9).
However, “circuit court review [is] confined solely to determining whether final agency action is an unreasonable exercise of the state’s police power constituting a taking without just compensation.” The statute defines “agency” as “any . . . unit or entity of state government,” and “permit” as “any permit or license required by [Fla. Stat. ch. 403].”

Since major source permits are already covered by Fla. Stat. ch. 403.0872, Fla. Stat. ch. 403.90 seems to apply to all other state permits, including Title V general permits. Accordingly, decisions of counties that exercise delegated authority to issue state permits are subject to challenge under FAPA.

G. Sources of Funding for Local Air Pollution Control Programs

There are numerous sources of funding for APCPs. The federal government, through the Environmental Protection Agency, offers grants under §§ 103 and 105 of the Clean Air Act. Section 103 grants are available to local governments to fund ambient air quality monitoring projects.\textsuperscript{149} Section 105 grants are available to fund personnel, supplies, equipment, training, travel, and other general expenditures related to the administration of the local air program.\textsuperscript{150}

Florida also provides funding for APCPs through the Air Pollution Control Trust Fund\textsuperscript{151} and contractual arrangements between DEP and counties for permitting, monitoring, and compliance functions. These contractual arrangements are included in air pollution specific operating agreements, and may include sharing revenues from such sources as asbestos fees,\textsuperscript{152} Title V permit fees and state permit fees.

APCPs may also issue local permits for sources not covered by other permitting systems.

\textsuperscript{151} See FLA. STAT. ch. 320.03(6) (1997). The Air Pollution Control Trust Fund is funded through a $1 surcharge on auto tags. If a county has an approved local air program, it is eligible to receive at least 50% of the tag fees it generates each year.
\textsuperscript{152} See FLA. STAT. ADMIN. CODE ANN. r. 62-257.400 (1999).
Generally, local permit programs will generate application fees and renewal fees. Furthermore, local permit regulations may provide for the assessment of fines on facilities that do not comply with their permits. For example, Miami-Dade County requires a variety of commercial entities to obtain an operating permit (and pay a corresponding fee) from the Department of Environmental Resources Management.\textsuperscript{153} The County also enforces its environmental regulations through such means as scheduled fines and civil damage penalties.\textsuperscript{154}

Local commitment of resources is critical, especially during the creation of the program. Since Florida requires DEP approval of local air programs, Section 105 grants might not be available to local governments until after their programs are approved. Moreover, \textit{DARM-OGG-04} states that DEP will not include tag fees when it analyzes the financial condition of a local air program during the approval process. Thus, a local government must essentially show that it has the ability and commitment to operate its program without outside funding.

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153. \textit{Miami-Dade County Code of Ordinances} § 24-35.1. \\
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