Environmental Protection in California: Court Action Powers of State and Local Government Attorneys

James P. Wagoner

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol14/iss2/4
ENVIRONMENTAL PROTECTION IN CALIFORNIA: COURT ACTION POWERS OF STATE AND LOCAL GOVERNMENT ATTORNEYS

James P. Wagoner*

I. INTRODUCTION

The fog closed over Donora [Pennsylvania] on the morning of Tuesday, October 26th [1948]. The weather was raw, cloudy, and dead calm, and it stayed that way as the fog piled up all that day and the next. By Thursday, it had stiffened adhesively into a motionless clot of smoke. That afternoon, it was just possible to see across the street, and, except for the stacks, the mills had vanished. The air began to have a sickening smell, almost a taste. It was the bittersweet reek of sulfur dioxide. Everyone who was out that day remarked on it, but no one was much concerned. The smell of sulfur dioxide, a scratchy gas given off by burning coal and melting ore, is a normal concomitant of any durable fog in Donora. This time it merely seemed more penetrating than usual.

As one of the physicians described it, "I knew that whatever it was that we were up against was serious. I had seen some very pitiful cases and they weren't all asthmatics or chroniclers of any kind. Some were people who had never been bothered by fog before. I was worried, but wasn't bewildered. It was no mystery—it was obvious—all the symptoms pointed to it—that the fog and smoke were to blame. I didn't think any further than that. As a matter of fact, I didn't have time to think or wonder. I was too damn busy. My biggest problem was just getting around. It was almost impossible to drive. I even had trouble finding the office. McKean Avenue was solid coal smoke. I could taste the soot when I got out of the car, and my chest felt tight. On the way up the stairs, I started to cough and I couldn't stop. I kept coughing and choking until my stomach turned over—just made it to the office and into the laboratory in time. My God, I was sick! After a while I dragged myself into the office and gave myself an injection of adrenalin and

* B.A., St. Mary's College, 1970; J.D., University of Santa Clara School of Law, 1973; Member, California Bar.
lay back in a chair. I began to feel better. I felt so much better I got out a cigar and lighted up. That practically finished me. I probably should have known better—cigars had tasted terrible all day—but I hadn't had that reaction before. Then I heard the phone ringing. I guess it must have been ringing off and on all day long. I thought about answering it, but I didn't have the strength to move.¹

From this single three day incident of fog mixed with polluted air, twenty people died and nearly six thousand were made ill in a city of approximately fourteen thousand persons.² Similar environmental catastrophes have occurred in New Orleans, Louisiana; Weirton, West Virginia; London, England; Yokohama, Japan; Poza Rica, Mexico and Belgium.³

Although severe incidents such as these occur infrequently, few arguments can be raised against the premise that the daily pollution of the environment is a critical problem. One need only glance at our brown sky, murky rivers, and disappearing wildlife to determine that mankind is nearing the point of giving Mother Nature an abortion.

In response to this pollution problem, the California legislature has enacted new laws designed to curb the rapid degradation of the environment.⁴ Most of these laws have established new administrative agencies or have empowered existing agencies with the authority to take particular action to solve specific problems.⁵ Few agencies, if any, are clothed with the authority to establish overall environmental goals and take the steps necessary to achieve them.⁶

2. Id.
3. Id.
5. See, e.g., CAL. BUS. & PROF. CODE § 5200 et seq. (West Supp. 1973) (the Department of Public Works has jurisdiction over outdoor advertising near freeways); CAL. FISH & GAME CODE §§ 900-03 (West Supp. 1973) (the Department of Fish and Game has jurisdiction over endangered species); CAL. HEALTH & SAFETY CODE §§ 39010-13 (West Supp. 1973) (the Department of Public Health has power to control motor vehicle emissions); CAL. PUB. RES. CODE §§ 21100-07 (West Supp. 1973) (the Office of Planning and Research prepares environmental impact reports); CAL. STS. & H'WAYS CODE §§ 70, 227-28 (West Supp. 1973) (the Highway Commission and the Scenic Highway Advisory Committee has power over all other highways); Lynch and Stevens, ENVIRONMENTAL LAW—The Uncertain Trumpet, 5 U.S.F. L. REV. 10 (1970-71); Comment, Regional Control of Air and Water Pollution in the San Francisco Bay Area, 55 CALIF. L. REV. 702 (1967).
6. See note 5 supra. Note, however, that the legislature recently enacted
In addition to action by the legislature, response has been generated by concerned citizen groups such as the Sierra Club and numerous local organizations. However, when such groups take pollution problems to court they often find their hands tied by issues such as standing to sue and the difficulty of meeting class action requirements, as well as by the burdensome costs of litigation.

There is need in California for integrated governmental entities with ample authority, manpower, and finances to assume overall leadership to deal with environmental problems comprehensively. As will be demonstrated in the following discussion, the Attorney General and the various district attorneys, county counsels, and city attorneys are currently the only persons who have the broad powers and sufficient resources to achieve overall environmental objectives. With respect to these objectives, even if the activities of other government agencies and citizens' groups eventually become adequately and efficiently organized, the powers of government attorneys nevertheless are useful as additional, independent weapons against environmental destruction.

II. STATUTORY POWERS

A. Powers of the Attorney General

1. General Powers

As chief law officer of the state, the California Attorney General derives broad environmental protection powers from two primary sources. Article V, section 13 of the California Constitution provides:

Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the state. It shall be his duty to see that the laws of the state are uniformly and adequately enforced. He shall have direct supervision over every District Attorney and Sheriff and over

Government Code sections 16000-81 establishing the Environmental Quality Study Council. The council is designed to establish overall environmental goals with the assistance of state agencies. The ultimate effectiveness of the council has not yet been established; its members are all high-ranking political appointees. See CAL. GOV'T CODE § 16050 (West Supp. 1973).


such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make to him such reports concerning investigation, detection, prosecution and punishment of crime in their respective jurisdictions as to him may seem advisable. Whenever in the opinion of the Attorney General any law of this state is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of the law of which the superior court shall have jurisdiction, and in such cases he shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, he shall assist any district attorney in the discharge of his duties.6

Pursuant to this provision, the Attorney General and his authorized agents10 possess statutorily enacted environmental protection powers in several different capacities: (1) the Attorney General is the legal representative of state agencies; (2) he has the power of attorney in the legal matters of the state; and (3) he directs and assists in legal actions brought by the counties.

As exclusive representative of most state agencies,11 the Attorney General represents those agencies which exercise some environmental functions. For example, the state departments of Public Resources, Fish and Game, and Health, the Water Resources Control Board, the Air Resources Board, and the State Lands Commission are all represented by the Attorney General.12 A few exceptions to this general rule of exclusive representation by the Attorney General exist by statute13 and other exceptions may be made when the Attorney General consents to the employment of outside counsel,14 the governor appoints outside counsel,15 or the Attorney General requests a local

---

11. CAL. GOV'T CODE § 11042 (West 1968) states that "[n]o state agency shall employ any legal counsel other than the Attorney General, or one of his assistants or deputies, in any matter in which the agency is interested."
13. CAL. GOV'T CODE §§ 11041, 12511 (West 1968). See also CAL. CORP. CODE § 25307 (West 1970); CAL. HARB. & NAV. CODE § 76.6 (West 1970); CAL. REV. & TAX CODE § 23035 (West 1970). Note that even though the Public Utilities Commission can employ outside counsel, Public Utility Code section 307 requires the Attorney General to act on behalf of the Commission if requested. CAL. PUB. UTIL. CODE § 307 (West 1956).
15. Id. § 12013. See also CAL. GOV'T CODE §§ 12520, 12533 (West 1963) authorizing the employment of special counsel in such situations.
The Government Code not only stipulates that the Attorney General act as the legal representative of state agencies, but also that he be in charge of the Department of Justice and have the power of attorney in virtually all legal matters in which the state has an interest. Consequently, irrespective of his other vested powers, the Attorney General possesses certain environmental powers directly through his involvement in suits relating to state lands or the state’s rights therein. Accordingly, in People v. Holladay, the Attorney General brought an action for the removal of certain buildings from land owned by the state and designated as a park; and in California & Northern Ry. v. State the Attorney General represented the state in condemnation proceedings brought against state lands. Within these general powers, the Attorney General could conceivably represent the state in its proprietary capacity in various types of actions.

The Attorney General also possesses certain environmental protection powers through his participation in actions to which a county is a party. By statutory provision, the Attorney General is authorized to “assist” local district attorneys in the discharge of their duties. Although this provision mentions only the dis-


19. 68 Cal. 439, 9 P. 655 (1886).

20. 1 Cal. App. 142, 81 P. 971 (1905).

21. See note 18 supra.

22. As in the case of state agencies, the Attorney General may be removed as counsel in these situations under certain conditions: employment of outside counsel, appointment by the Governor of outside counsel, or involvement of a state agency authorized to employ outside counsel. See notes 13-16 and accompanying text supra.

23. CAL. GOV’T CODE § 12550 (West 1970) states:

When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violation of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue
district attorney, it may include assistance to a county counsel as well. It is thus possible for the Attorney General to assist in numerous suits litigated primarily by county attorneys. These suits could include environmental protection actions on behalf of local Air Pollution Control Districts, Water Districts, Soil Conservation Districts, Departments of Public Works, and other local agencies.

This empowering provision as well as the constitutional authority of the Attorney General also authorizes him to take charge of prosecutions for violations of law. Although this section was probably enacted with criminal prosecutions in mind, it has been held that the Attorney General has the power to supervise civil actions brought by a county. Accordingly, violations of law normally prosecuted by a county may be prosecuted by the Attorney General. These include such violations as maintaining local public nuisances, failing to comply with emission requirements, and violating water pollution standards.

2. Specific Powers

Certain specific environmental powers augment the general powers of the Attorney General. In 1971, the legislature enacted a broad authorization of authority for the Attorney General to protect the natural resources of the state from pollution, impairment or destruction. This action was, in part, an attempt to broaden the scope of the Attorney General's environmental authority but also an attempt to nullify the implications of an appellate decision in People v. New Penn Mines. In that case...

---

24. See CAL. GOV'T CODE §§ 26529, 27642, 27645 (West 1968) providing that the appointed county counsel discharge the civil duties of the district attorney.


27. CAL. PUB. RES. CODE § 9266 (West 1970).


29. CAL. GOV'T CODE § 27645 (West 1968).


33. See text, Section II, B infra. The Attorney General also has a conditional right of appeal to the California Supreme Court in suits involving a county.

34. CAL. GOV'T CODE §§ 12600-12 (West Supp. 1973).

35. 212 Cal. App. 2d 667, 28 Cal. Rptr. 337 (1963). For a fuller discus-
the Attorney General brought a nuisance action seeking abatement of toxic mine wastes which were being discharged into the Mokelumne River. The court analyzed the scope of the Dickey Water Pollution Act and held that the breadth of the act preempted the authority of the Attorney General to bring the action in question.

To remedy the effect of this decision, the legislature enacted Government Code sections 12000-612 which grant broad environmental protection authority to the Attorney General. Government Code section 12606 provides:

The Attorney General shall be permitted to intervene in any judicial or administrative proceeding in which facts are alleged concerning pollution or adverse environmental effects which could affect the public generally.

This section permits the Attorney General to represent the interests of the people in any proceeding in which the outcome could affect the environment. Furthermore, Government Code section 12607 provides:

The Attorney General may maintain an action for equitable relief in the name of the people of the state of California against any person for the protection of the natural resources of the state from pollution, impairment or destruction.

The term "natural resources" is broadly defined in Government Code section 12605 to include "land, water, air, minerals, vegetation, wildlife, silence, historic or aesthetic sites, or any other natural resource which, irrespective of ownership contributes, or in the future may contribute, to the health, safety, welfare, and enjoyment of a substantial number of persons, or to the substantial
balance of an ecological community." Under the breadth of this definition, the Attorney General can file an independent action, or intervene in an existing action, for the purpose of protecting any aspect of the environment.

Even prior to 1971, the Attorney General possessed statutory power to protect the environment by abating public nuisances. Civil Code section 3480 defines a public nuisance as "one which affects, at the same time, an entire community or neighborhood, or any considerable number of persons;" Civil Code section 3494 permits any public body or authorized officer to abate such a nuisance. It has been held that the Attorney General possesses this abatement power on behalf of the people. Numerous activities damaging to the environment may be abated as public nuisances, including the operation of quarries, blasting, unlawful diversion of water, pollution of streams and rivers, and air and noise pollution. Moreover, numerous code provisions declare particular activities or objects to be public nuisances and thus subject to abatement. These include unauthorized operation of placer mines, oil and gas wells in certain areas, unau-

41. Other Government Code sections relating to the Attorney General's independent statutory power include: § 12600 (legislative findings and declaration), § 12601 (caveat expressly disclaiming pre-emption of other statutory or common-law powers), § 12602 (severability section), § 12603 (providing for liberal construction), § 12604 (defining "person" for purposes of authorizing the Attorney General to institute action against any person, organization or agency), § 12608 (providing for certain affirmative defenses by the defendant), § 12609 (statute of limitations), § 12610 (providing for the imposition of conditions on the defendant when equitable relief is granted), § 12611 (providing for stay of court proceedings), § 12612 (providing prerequisites for intervention or judicial review of administrative decisions).
42. CAL. CIV. CODE § 3480 (West 1970).
43. CAL. CIV. CODE § 3494 (West 1970).
Authorized billboards, improperly maintained rubbish dumps, and cesspools in particular areas.

Other specific powers given the Attorney General include several extraordinary equity powers which may be used in certain situations to protect the environment. These powers relate to water and air quality. Under section 13262 of the California Water Code, the Regional Water Quality Control Boards may request the Attorney General to obtain an injunction to halt the discharge of waste into public waters. Injunctive relief is statutorily facilitated when so sought. Section 13361(c) of the Water Code eliminates the requirements of alleging or proving irreparable injury or inadequacy of the remedy at law, which is normally required in an action for an injunction.

The Attorney General has been given similar powers with respect to air pollution under several pieces of air quality legislation enacted over the years. This legislation authorizes the Attorney General to enjoin the discharge of contaminants in violation of an order or rule of a local air pollution control district or regional air resources board. As with the water quality powers, the important factor is that the Attorney General is not required to allege or prove inadequacy of remedy at law or potential irreparable injury. By removing these requirements, the Attorney General is permitted to file and succeed in many water and air quality actions which would otherwise fail due to the proof problems traditionally associated with equity actions.

Prior to 1971 the California Attorney General's office confined its involvement in the environmental protection arena primarily to representing state agencies. In 1971, Attorney Gen-

53. CAL. PUB. RES. CODE § 4375 (West 1970); CAL. PUB. RES. CODE § 4441 (West 1970). Other statutorily declared public nuisances include: insect infested plants or premises, abandoned crops, citrus plants infested with particular types of flies, certain types of weeds, citrus plants in certain areas, animals infested with dourine, all of which are provided for in the California Agriculture Code.
54. CAL. WATER CODE § 13950 (West 1970).
56. CAL. WATER CODE § 13361(c) (West 1970).
59. Id.
60. Letter from Larry C. King, Deputy Attorney General, State of California, to author, November 8, 1972.
eral Evelle Younger created a separate environmental law unit comprised of ten attorneys to handle self-generated environmental actions. With the establishment of the new unit and the enactment of legislation giving the Attorney General broad environmental powers,61 the California Attorney General's office has the potential for actively pursuing environmental protection actions in a wide variety of areas such as air and water pollution, land use, noise pollution, solid waste management, population, pesticides, beach access, fish, game and endangered species, forest practices, highways, oil, public utilities, radiation, wildernesses and wild rivers.62

In order to enlist citizen input and assistance in developing courses of action, the environmental unit has established numerous Environmental Task Forces throughout the state.63 These Task Forces are composed of twenty to twenty-five volunteer members from five major categories:

1. other public attorneys with environmental responsibilities such as the district attorneys, county counsels and city attorneys;
2. public administrative officials charged with environmental enforcement (including the Regional Administrator of the United States Environmental Protection Agency and the chairman of the local Regional Water Quality Control Board);
3. representatives of citizens' organizations with environmental interests (such as the county president of the League of Women Voters and a representative of the Sierra Club);
4. independent experts in major environmental areas (for example, air, water, noise, land use, solid waste); and,
5. individuals representing business and student groups.64

Each Task Force usually has subcommittees which deal with problems in the areas of air, water, noise, land use and solid waste. These subcommittees are composed of both task force members and other interested citizens who may be appointed. Subcommittee recommendations are directed to the full Task Force, which may in turn make proposals for action to the Environmental Law Unit.65

---

64. See notes 60 and 62 supra.
The new unit, assisted by the Task Forces, has enabled the California Attorney General's office to become a major source of environmental litigation. Suits have been filed against violators ranging from private polluters to governmental agencies. The Attorney General's involvement in administrative actions ranges from appearing before local government boards to formally petitioning the United States Environmental Protection Agency and the Department of the Interior.  

**B. Powers of County Attorneys**

Each county in California has a district attorney as its legal representative. Many larger counties divide their legal duties into two categories—criminal and civil. In these counties the district attorney handles criminal matters but the county board of supervisors appoints a county counsel to handle civil matters. When a county counsel is appointed he will probably possess most of the environmental power previously conferred upon the district attorney. Statutes declaring the district attorney to be the proper party to take particular action in the environmental field can be interpreted as referring to the county counsel as well when such a position exists.

---

66. The Annual Report of the Attorney General's Environmental Law Unit discloses that from January, 1971, through May, 1973, 428 investigations were conducted. These investigations resulted in the Attorney General's initiating or participating in thirty court suits and thirty administrative actions. According to several members of the Task Forces that the author has interviewed, a "high percentage" of Task Force recommendations are ultimately approved for formal action. Reported appellate cases in which the Attorney General has participated include: City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972); Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973); and, Environmental Defense Fund v. Coastside County Water District, 27 Cal. App. 3d 695, 104 Cal. Rptr. 197, and 28 Cal. App. 3d 512, 104 Cal. Rptr. 714 (1972) (subsequent opinion).


69. Id. Note, however, that California Government Code section 25203 declares that the county board of supervisors should direct and control the prosecution and defense of all actions to which the county is a party. Under this section, the board of supervisors can, by a two-thirds vote, authorize the employment of outside counsel in order to assist in the handling of litigation. See also, CAL. GOV'T CODE § 31001 (West 1968).

70. See, e.g., CAL. AGRIC. CODE § 8 (West 1969); CAL. PUB. RES. CODE § 8 (West 1972). See also the discussion of Board of Supervisors v. Simpson, notes 94 to 112 and accompanying text infra.
1. General Powers

The district attorney and county counsel possess certain limited environmental power as the representatives of numerous districts, boards and regional state agencies.\(^71\) The primary duty of the county's civil representative is to advise and bring action on behalf of the county board of supervisors.\(^72\) Furthermore, the district attorney or county counsel represents numerous special districts and regional boards such as Air Pollution Control Districts, Water Districts, Soil Conservation Districts, the Board of Forestry, and the County Health Board.\(^73\)

The county district attorney also has certain environmental protection powers in his role as public prosecutor.\(^74\) In this capacity, the district attorney can bring criminal prosecutions for violations of certain environmental protection laws that specify criminal penalties. These violations include killing, trapping or wounding birds or game in a refuge,\(^75\) creating and maintaining a public nuisance,\(^76\) unlawfully accumulating waste on lands,\(^77\) failing to remove unlawful billboards,\(^78\) unlawfully discharging waste into a lake or stream,\(^79\) and discharging air pollutants.\(^80\) In addition, the district attorney has the authority to bring actions for monetary penalties for certain unlawful acts which adversely af-

---

\(^71\) CAL. GOV'T CODE § 27645 (West 1968). For codifications of general county powers relating to environmental protection that county counsels or district attorneys may enforce, see CAL. GOV'T CODE § 25803 (West 1968) (control of animals at large); CAL. HEALTH & SAFETY CODE § 4260 (West 1970); CAL. GOV'T CODE §§ 25600-02 (West 1968) (wild flower reserves); CAL. GOV'T CODE §§ 6950-54 (West 1968) (open spaces); CAL. GOV'T CODE §§ 7000-01 (West 1968) (scenic conservation reserves); CAL. GOV'T CODE §§ 25550-62, 37111-12 (West 1968) (county parks); CAL. GOV'T CODE § 54090 (West 1968) (beach access). See also Orange County Air Pollution Control Dist. v. Public Util. Comm'n, 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971).

\(^72\) CAL. GOV'T CODE § 27645 (West 1968).

\(^73\) Orange County Air Pollution Control Dist. v. Pub. Util. Comm'n, 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971).

\(^74\) CAL. WATER CODE § 30000 et seq. (West 1970).

\(^75\) CAL. PUB. RES. CODE § 9277 (West 1970).

\(^76\) CAL. GOV'T CODE §§ 25630-35 (West 1968).

\(^77\) CAL. HEALTH & SAFETY CODE §§ 450-51 (West 1970). At one time, the district attorney also represented the Regional Water Quality Control Boards. The case of People v. New Penn Mines, 212 Cal. App. 2d 667, 28 Cal. Rptr. 337 (1963), extremely limited that power however, and the legislature eventually turned all such representation over to the Attorney General. See CAL. WATER CODE § 13331 (West 1970).

\(^78\) CAL. GOV'T CODE § 26500 (West 1968).

\(^79\) CAL. FISH AND GAME CODE §§ 10508-10 (West 1958).

\(^80\) CAL. PEN. CODE §§ 369(h), 370 et seq. (West 1970).

\(^81\) CAL. PUB. RES. CODE § 4441 (West 1972).


\(^83\) CAL. WATER CODE § 13265 (West 1971).

\(^84\) CAL. HEALTH & SAFETY CODE § 24253 (West 1967).
fect the environment. These acts include oil spillage into state waters and intentionally or negligently discharging air contaminants in violation of the Mulford-Carrell Air Resources Act.

District attorneys and county counsels also obtain some environmental protection power through their representation of state agencies at the direction of the Attorney General. Government Code section 11157 provides that any action that could be undertaken by the Attorney General on behalf of a state agency can also be maintained by any local county counsel or district attorney at the Attorney General's request. This could include actions on behalf of state or regional water pollution control boards, the Department of Public Resources, the State Forester and many other agencies.

2. Specific Powers

The primary independent power which allows the county counsel or the district attorney to take environmental protection action is the power to abate public nuisances. A nuisance is defined as:

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

Under this abatement power, the authorized county attorney is allowed to bring actions in numerous areas. Specific code sec-

---

88. Upon request of the head of a department, the Attorney General, or under his direction the District Attorney of any county in which the proceeding is brought, shall aid in any investigation, hearing, prosecution or trial had under the laws which the department is required to administer, and shall institute and prosecute all necessary actions and proceedings for the enforcement of such law and for the punishment of all violations thereof. CAL. GOV'T CODE § 11157 (West 1968).
89. See notes 11 through 16 and accompanying text supra.
tions define certain actions to be public nuisances and authorize their abatement.92

In counties having both a district attorney and a county counsel, there is some question as to whether both officers may bring such an action, and if both may not, in whom the authority resides. When a county counsel is appointed, he is usually charged with all the civil duties previously conferred upon the district attorney,93 and a nuisance abatement action is generally considered "civil" in nature.94 However, in Board of Supervisors v. Simpson95 the California Supreme Court held that despite these principles, the Los Angeles County District Attorney was the proper party to bring a nuisance abatement action under the Red Light Abatement Act.96 Initially, the court examined the various provisions of the Los Angeles County Charter and de-

---

731a (West 1970) (which permits nuisances to continue in certain zoned areas). See generally Jarvis v. Santa Clara Valley R.R. Co., 52 Cal. 438 (1877) (rivers); Oil and Gas, Regulation of Production to Prevent Surface Nuisances, 4 HAST. L. J. 173 (1953) (oil).


93. CAL. GOV'T CODE §§ 26529, 27642, 27645 (West 1968).


95. Id.

96. See 15 Op. CAL. ATTY GEN. 231 (1950) where the question was decided in an identical manner.
terminated that the Los Angeles County Counsel's Office did not inherit the general powers set forth in the Government Code and applicable to most counties. The court held however, that even assuming that the Government Code provisions applied, the county district attorney was nevertheless the appropriate officer to bring the action. That holding was based on three principle factors: (1) several applicable code sections stated that the district attorney was authorized to bring a nuisance abatement action;97 (2) the abatement action was somewhat in the nature of a forfeiture and thus should be brought by the district attorney under his power to "prosecute actions for fines, penalties, and forfeitures;"98 and (3) although a nuisance action is civil in nature, a nuisance action under the Red Light Abatement Act aids the enforcement of criminal law.

Whether these factors would be controlling in the case of environmentally destructive public nuisances is debatable. As the Simpson court noted, many code sections authorize the district attorney to bring nuisance abatement actions.99 However, these sections should be construed in light of Government Code section 26529 which provides that when a county counsel is appointed, he shall discharge the civil duties of the district attorney.100 Second, the Simpson court's "forfeiture" rationale was weak in the context of that case and is even more so in the case of environmentally harmful public nuisances. For although abatement of some nuisances may involve something in the nature of a forfeiture (that is, destruction of billboards, abatement of weeds), many abatements control rather than confiscate (for example, control of noise, air and water pollution).101 Third, although all public nuisances are classified as crimes,102 criminal proceedings are much less likely to follow abatement of environmentally harmful nuisances than abatement of houses of prostitution. Moreover,

101. See notes 91 and 92 supra.
if the relative expertise of the two offices is compared, the county counsel would seem to be in a superior position since his office is theoretically more familiar with civil suits and with the various boards and districts that may become involved.\textsuperscript{108}

It is thus apparent that the determination of which county attorney is authorized to bring a nuisance abatement action is open to considerable question. Should this issue arise in the future, the most reasonable way to resolve the dispute would be to declare that either the district attorney or the county counsel has the authority to bring the action. Such a decision would recognize the numerous practical factors facing the two offices which undoubtedly vary from one county to the next, and would provide the officer most capable of pursuing the action with the necessary authority to do so. Furthermore, allowing concurrent authority over nuisance abatement actions would serve as an effective check on the discretion to decline to take such action\textsuperscript{104} and would be in accord with the recent trend in the environmental area of establishing concurrent authority among governmental entities over particular environmental problems.\textsuperscript{106} Additionally, this result would not be inconsistent with \textit{Simpson}, in that the question in that case was not who was authorized to bring the action but whether the district attorney was required to do so when ordered by the Board of Supervisors.\textsuperscript{108}

Moreover, the county attorney has special air pollution control powers under various control acts.\textsuperscript{107} As mentioned above, the elimination of traditional proof requirements in equity actions under these acts permits many suits to succeed that previously would have failed.\textsuperscript{108} Again, there is some question whether the county counsel or the district attorney is the proper party to bring the action. All of these legislative enactments indicate that the action is to be brought on behalf of "the people," but do not specify exactly who is to bring the action.\textsuperscript{109} Since it is a "civil

\begin{footnotes}
\footnotetext[103]{See Cal. Gov't Code §§ 27642, 27645 (West 1968).}
\footnotetext[104]{See text, section IV, B infra.}
\footnotetext[106]{Board of Supervisors v. Simpson, 36 Cal. 2d 671, 672, 227 P.2d 14, 15 (1951).}
\footnotetext[107]{See generally Diamond v. General Motors Corp., 20 Cal. App. 3d 374, 97 Cal. Rptr. 639 (1971).}
\end{footnotes}
SANTA CLARA LAWYER

action," it may be that the appointed county counsel is the proper party; but, since the nature of an air pollution action is similar to nuisance abatement actions, the conservative reasoning employed in Simpson may apply to make the district attorney the proper party. Again, the most logical conclusion would be to permit either officer to bring the action, thus establishing concurrent authority over air pollution control.

C. Powers of City Attorneys

As the legal representative of an incorporated city, the city attorney also possesses certain limited environmental powers that can be used to preserve the environment. These powers relate to nuisance abatement and possibly to air pollution control. The city attorney has the power to abate all public nuisances so prescribed by state statute. Consequently, he also is empowered to take action in such areas as air pollution, water pollution, land use and solid waste control. Since, in addition to the customary nuisance powers derived from the state, the legislative body of every city is authorized to declare by ordinance what constitutes a nuisance, the city attorney possesses additional environmental protection powers incident to his power to enforce city ordinances by criminal or civil action.

The city attorney may also be authorized to enjoin violations of various air pollution control acts. Since these acts do not specify who may bring the action, the city attorney, as a representative of the people, may well be authorized to enjoin the discharge of air contaminants. The importance of proceeding

111. See notes 93-103 and accompanying text supra.
112. See note 105 and accompanying text supra.
114. See notes 91 and 92 supra.
119. Although no decision has been found which is directly on point, city attorneys have traditionally brought normal nuisance actions in the name of "The
under these acts is, of course, that in so doing the city attorney need not allege nor prove inadequacy of remedy at law or irreparable injury in order to obtain an injunction.\[^{120}\]

III. COMMON-LAW POWERS

Above and beyond the statutory powers possessed by the attorney general, county attorney and city attorney, the legal representatives of the people traditionally retain broad powers under the common law to take action to protect the public interest.\[^{121}\]

In California, the general rule is that the common law is still in effect unless overturned by statute.\[^{122}\]

As chief law officer of the state, the California Attorney General is generally held to possess the common-law power to represent the interests of the people.\[^{123}\]

In *Pierce v. Superior Court*,\[^{124}\]

the supreme court held that the Attorney General has broad common-law powers to file any civil action or proceeding which directly involves the rights or interests of the state, or which he considers necessary for the enforcement of the laws of the state, the preservation of order, and the protection of rights and interests of the...
public. Subsequently, in *Don Wilson Builders v. Superior Court*,\(^{125}\) the court of appeal held that the Attorney General has the power under the common law to file a civil action to enjoin unlawful racial discrimination in housing. In a lengthy and vigorous dissent, Justice Fourt noted that the *Pierce* decision was handed down four days before the voters enacted article V, section 21 of the California constitution\(^{126}\) which set forth the particular powers of the Attorney General. Justice Fourt argued that the powers delineated in the constitution are the sole powers the Attorney General possesses. According to this argument the enactment of the constitutional provisions pre-empted the common law powers of the Attorney General.\(^{127}\) Although this view has merit, recent decisions of the California appellate courts indicate that the Attorney General still retains his broad powers under the common law.\(^{128}\)

Regardless of the status of these common-law powers, they are infrequently used in the environmental field because of the availability of broad statutory powers to abate nuisances and protect the state's natural resources.\(^{129}\) Nevertheless, the continued retention of common-law powers provides the Attorney General with the capacity to file practically any action necessary to protect the environment although such action is not necessarily authorized by statute.\(^{130}\)

\(^{126}\) Now CAL. CONST. art. V, § 13.
\(^{127}\) Accord, *State v. Davidson*, 33 N.M. 664, 275 P. 373, 375 (1937); *State v. Industrial Comm'n*, 172 Wis. 415, 179 N.W. 579, 580 (1934). See also *People v. Brophy*, 49 Cal. App. 2d 15, 120 P.2d 946 (1942) (where the power of Attorney General Earl Warren to send a letter to the phone company requesting discontinuance of a customer's service on the grounds of illegal gambling was challenged. The court held that even though the customer was allegedly involved in gambling interests, the Attorney General had no power to act in this manner).
\(^{129}\) See text, section II, A supra.
\(^{130}\) Although the definitions of "nuisance" and "natural resource" are extremely broad (see CAL. CIV. CODE § 3479 (West 1970); CAL. GOV'T CODE § 12605 (West Supp. 1973)) the cases brought under the Attorney General's common-law power indicate an even broader ability to act on behalf of the people. See generally *People v. San Diego Unified School Dist.*, 19 Cal. App. 3d 252, 96 Cal. Rptr. 658 (1971) (action to compel the school board to eliminate racial imbalance in the public schools); *People ex rel. Mosk v. Lyman*, 253 Cal. App. 2d 959, 61 Cal. Rptr. 800 (1967); *Brown v. Memorial Nat'l Home Foundation*, 162 Cal. App. 2d 513, 329 P.2d 118 (1958) (action to settle control of a charitable trust).

In addition to the traditional injunction action, a theory has been put forth to the effect that the people are beneficiaries of the environment held in trust by the government. See Cohen, *The Constitution, The Public Trust, and the Environment*, 1970 UTAH L. REV. 388; Sax, *The Public Trust Doctrine in Natu-
Though local government attorneys have certain environmental protection powers in the area of nuisance abatement and air pollution, it is doubtful whether the common-law power of the Attorney General extends past his office and concurrently resides in local government attorneys. The California courts consistently have held that counties are agents of the state, possessing only the authority conferred upon them by the legislature.\(^\text{131}\) Similarly, cities are municipal corporations and possess only those powers expressly permitted them by the legislature.\(^\text{132}\) Apparently then, neither county attorneys nor city attorneys inherit the Attorney General's common-law powers without an express authorization from the legislature.

Although there are no decisions precisely on point, several cases support this position by indicating that actions brought by local government attorneys are limited to those authorized by statute. In \textit{San Diego County v. Central Southern Ry. Co.},\(^\text{133}\) the district attorney brought an action to recover delinquent state and county taxes. The court dismissed the action, even though the taxes were in fact due, on the grounds that the district attorney was not expressly authorized to bring the action.\(^\text{134}\) In \textit{Ventura County v. Clay},\(^\text{135}\) the district attorney filed suit against the county treasurer. Again the court dismissed the action on the grounds that it was beyond the express statutory authority of the district attorney.\(^\text{136}\) It should be noted, however, that some authority exists which would support the right of local government attorneys to maintain actions not specifically authorized by statute.\(^\text{137}\)

---


\(^{133}\) 1 P. 897 (1884).

\(^{134}\) \textit{Id.} See CAL. GOV'T CODE § 23004 (West 1968).

\(^{135}\) 119 Cal. 213, 51 P. 189 (1897).

\(^{136}\) \textit{Id.} Another case demonstrating local government attorney's lack of common-law power is \textit{People v. City of Los Angeles}, 160 Cal. App. 2d 494, 325 P.2d 639 (1958). The City of Manhattan Beach attempted to enforce a judgment obtained by the Attorney General under his common-law powers which prohibited the City of Los Angeles from dumping sewage into Santa Monica Bay. The court dismissed the action on the grounds that the city had no power to exercise the state's common-law powers.

\(^{137}\) See, e.g., Flemming v. Hance, 153 Cal. 162, 94 P. 620 (1908); Modoc County v. Spencer, 103 Cal. 498, 37 P. 483 (1894). Both of these cases found
IV. SPECIFIC PROBLEM AREAS

A. The Problem of Pre-emption

Clearly, state and local government attorneys have broad general and specific powers which can be used to protect the environment. Because of the diversity of these powers, and the ever increasing number of boards, special districts, and varied methods of protecting the environment, the question arises as to whether any of these general powers are pre-empted by more recently enacted specific ones.

The general test as to whether a particular area is pre-empted is whether the legislature, by its specific enactments, has manifested an intent to "occupy the field." In the area of general powers of governmental attorneys, such pre-emption can occur in one of two ways: by specifying a particular method of meeting a specified problem, thus implying the exclusion of other potential methods; or by thoroughly covering a particular field by statute, indicating an intention to preclude further involvement by other governmental entities.

Both methods of pre-emption were found by the court in People v. New Penn Mines, Inc. In that case, the Attorney General had brought an action to abate a public nuisance caused by drainage of toxic mine wastes into the Mokelumne River. The defendant demurred on the ground that the Attorney General's power to bring such an action was pre-empted by the enactment of the Dickey Water Pollution Act. On appeal, the court examined the entire scheme of the act and determined that although

that the district attorney represents the sovereign power of the state. See also Elser v. Gill Net Number One, 246 Cal. App. 2d 30, 54 Cal. Rptr. 568 (1966) where the district attorney was permitted to bring an action that should have been brought by the Attorney General.

138. See notes 4 and 5 supra.


140. Stated in more detail, pre-emption by state law occurs if one of three tests is met:

(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;
(2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or
(3) the subject matter has been partially covered by general law, and the subject is of such nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.


142. See CAL. WATER CODE § 13000 et seq. (West 1971).
the act expressly disclaimed pre-emption of local government powers, it contained no express reservation regarding the Attorney General's power. The court concluded that the legislature intended to preclude the Attorney General from taking any independent action because the act only provided for his participation upon request by the Regional Board, and because the comprehensive statutory scheme was deemed conclusive.143

Several years after the New Penn Mines decision, a court of appeal in People v. Union Oil144 reached an apparently contradictory conclusion. The defendant in Union Oil was criminally prosecuted for discharging oil into state waters in violation of the Fish and Game Code.145 He demurred on the ground that the Dickey Water Pollution Act pre-empted criminal penalties in this situation.146 The court disagreed, holding that the various remedies for such violations were complementary rather than contradictory, and that the scope of the act did not indicate a legislative intent to exclude criminal penalties.

The apparent conflict between New Penn Mines and Union Oil illustrates how easily the issue of pre-emption can arise, and the incident difficulty dealing with the problem. In New Penn Mines, the court relied on the fact that the Attorney General's participation was provided for in the act only when he was requested to take action by the Regional Board.147 Similar reasoning could be applied in like situations where a particular governmental attorney's participation is separately provided for by statute.148 Under this reasoning, a statute specifying that a governmental attorney is to take action under certain conditions could be interpreted as limiting his involvement to that action only. Additionally, the court in the New Penn Mines case relied on the fact that a particular entity, the Regional Water Pollution Control Board, had primary authority to regulate the type of pollution in question in accordance with the statutory scheme.149 Under this rationale, any statute vesting primary authority over a problem in a particular agency can be construed as precluding other governmental entities from becoming involved.150

144. 268 Cal. App. 2d 566, 74 Cal. Rptr. 78 (1968).
145. See CAL. FISH & GAME CODE § 5650 (West 1958).
146. See CAL. WATER CODE § 13000 et seq. (West 1971).
147. The New Penn Mines decision has been specifically overturned by the legislature. See CAL. WATER CODE § 13063 (West 1971); Lynch and Stevens, Environmental Law—The Uncertain Trumpet, 5 U.S.F. L. REV. 10, 23-4 (1970).
148. See, e.g., CAL. FISH & GAME CODE §5800 (West 1958).
150. For cases involving general pre-emption of local governmental powers in
Generally, the state legislature has been careful to expressly disclaim pre-emption when enacting various pieces of environmental legislation. Nevertheless, the problem of pre-emption cannot be easily resolved. In *Orange County Air Pollution Control District v. Public Utilities Commission*, the California Supreme Court held that both the local district and the Public Utilities Commission had concurrent authority over the construction of power plants which emitted contaminants into the air. In so holding the court pointed out that air pollution was a matter of state-wide concern. The court noted that several statutes in the 1947 Air Pollution Control District Act purported to disclaim pre-emption of existing and future local ordinances. The court stated, however, that the possible validity of local pollution controls obviously has no effect on the validity of district regulation of non-local matters. By adding this conclusion, the court expressed its belief that regardless of whether pre-emption is expressly disclaimed, some matters are of such overriding concern to the welfare of the entire state that local ordinances and public nuisance actions are incapable of effectively regulating them. One illustration will suffice to demonstrate the complexity of the problem. If various cities and counties began enforcing different exhaust emission standards, or several independent governmental attorneys began instituting nuisance actions against vehicular emissions based on divergent standards, intrastate commerce could quickly grind to a halt. Accordingly, although the legislature may have expressly disclaimed pre-emption in certain areas, it is doubtful that these disclaimers will be interpreted as being absolute. Rather, it is readily inferable that such disclaimers may be held to apply only to ordinances or actions covering problems of purely "local concern."

It should be pointed out that the recently enacted comprehensive statutory powers of the Attorney General greatly diminish

the environmental area, see Castiglione v. County of San Diego, 15 Cal. App. 3d 880, 93 Cal. Rptr. 499 (1971) (permit requirement not pre-empted by lack of relevant zoning ordinance); People v. Mueller, 8 Cal. App. 3d 949, 88 Cal. Rptr. 157 (1970) (water pollution ordinance held not pre-empted). See also People v. Atchison T. & S.F. Ry. Co., 268 Cal. App. 2d 501, 74 Cal. Rptr. 222 (1968) (where the court held that local governments could not validly control air pollution caused by trains without violating the interstate commerce clause).


152. 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971).


154. 4 Cal. 3d at 953, 484 P.2d at 1366, 95 Cal. Rptr. at 22 (1971).

155. *See Orange County Air Pollution Control Dist. v. Public Util. Comm'n, 4 Cal. 3d 945, 953, 484 P.2d 1361, 1366, 95 Cal. Rptr. 17, 22 (1971).*
the possibility of a court's holding that certain general powers of the Attorney General have been pre-empted. Nevertheless, that possibility still remains. For instance, an action seeking to enjoin the operation of all automobiles in the state is clearly a decision which should be left to the legislature. This point was demonstrated in the recent case of Diamond v. General Motors. In Diamond, a private citizen brought a class action seeking to enjoin the sale and registration of automobiles which pollute the environment. The court declined relief, indicating that the legislature was attempting to deal with the problem, and that an issue with such a significant impact on the economy and the welfare of the state is one of legislative and not judicial concern. Although the court did not discuss the power of the Attorney General to bring such a suit, the reasoning of the court manifestly demonstrates that regardless of who the plaintiff may be, such relief will be considered beyond the court's authority and an invasion of legislative prerogatives. The Attorney General's capacity in such matters is nominally quite broad, but in effect limited to relief which the courts will allow.

B. Mandamus to Require Action

In the preceding discussion, it has been demonstrated that state and local government attorneys, especially the Attorney General, have broad legal and equitable powers that can be used to protect the environment. In the use of these powers, however, the government attorney may decline to take action on a particular matter. Should this occur, a private citizen may be able to compel the appropriate action through a writ of mandamus. Section 1085 of the Code of Civil Procedure provides that a writ of mandate may be issued "to any inferior tribunal, corporation, board or person to compel the performance of an act which the law specially enjoins." Under this section, a state or local government attorney can be compelled by mandamus to perform a duty required by law. The cases dealing with mandamus actions against government attorneys turn on the question of whether the particular action is a required duty, and if so, under what circumstances it may be compelled.

1. Mandatory Duties

Mandatory duties are either absolute or qualified. An ab-
solute duty was exemplified in Board of Supervisors v. Simpson.160 There a writ of mandate was sought to compel the district attorney to institute a nuisance abatement proceeding. The plaintiffs relied on the wording of Government Code section 26528, which declares:

The district attorney may, and when directed by the board of supervisors shall, bring a civil action in the name of the people of the State of California to abate a public nuisance in his county.161

On the basis of this section, the court held that since the board of supervisors had directed the district attorney to take the action, the duty of the district attorney to commence the proceedings was mandatory.162 The determination of whether a nuisance existed had been made by the board of supervisors. Once this determination had been made, the district attorney's mandatory duty became absolute.

As illustrated in Blankenship v. Michalski,163 a "mandatory" duty may be qualified. There, a private citizen sought mandamus against a city attorney to compel him to institute abatement proceedings against a zoning violation. As in the Simpson case, the applicable ordinance specified that the city attorney "shall" commence all necessary actions for the removal of zoning violations. Here, however, the determination of the facts necessary to institute proceedings was to be made by the city attorney, not by the board of supervisors as in Simpson. Because of this distinction, the Blankenship court indicated that the question of whether a violation existed was reasonably debatable, and held that the city attorney could not be compelled by mandamus to institute proceedings unless a violation was "clear and obvious." Unfortunately, the court declined to elaborate on the meaning of "clear and obvious" and thus failed to establish a meaningful precedent in the area. The Blankenship decision illustrates the notion of "qualified" mandatory duties; the qualification in that case was the initial determination by the city attorney as to whether the zoning violation existed at all.164

161. CAL. GOV'T CODE § 26528 (West 1968) (emphasis added).
164. Id. at 675, 318 P.2d at 729 (1957). See also Wilson v. Sharp, 42 Cal. 2d 675, 268 P.2d 1062 (1954) (where a taxpayer sought damages against a county counsel for failure to institute a cause of action accruing to the county for the illegal expenditure of funds). The statute authorizing the cause of action provided that the district attorney (or in this case the county counsel) "shall" institute the suit. The court held that since both the determination of whether there had been a violation and whether the facts were sufficient to warrant the action were within the county counsel's discretion, the established rule that public officers...
In the area of environmental protection duties, many statutes provide for mandatory duties that may be either absolute or qualified. For example, Water Code section 13331 provides that the Attorney General “shall” seek an injunction to enforce an order of the Water Quality Control Board when requested by the board. Under the authority of Board of Supervisors v. Simpson, the Attorney General could be compelled by mandamus to take such action once the Water Quality Control Board requests it; since the determination of a violation is made by another body, the duty to institute the proceeding is absolute. On the other hand, statutes such as Fish and Game Code section 5800 provide that the district attorney “shall” institute proceedings against water pollution in the Trinity and Klamath River district. However, the determination of whether a violation exists remains with the district attorney. Thus, under the holding of Blankenship, he could be compelled by mandamus to commence proceedings only if the violation is “clear and obvious.”

2. Discretionary Duties

If mandamus is sought to compel the exercise of a discretionary duty, the standard of judicial review is stricter than it is for compelling the exercise of a mandatory duty. In City of Campbell v. Mosk, mandamus was sought to compel the Attorney General to grant the city permission to sue in quo warranto. The court pointed out that the statute in question declared that the Attorney General “may” grant such permission, and found that the action sought to be compelled was wholly discretionary in nature. The court concluded that to “justify court intervention, the abuse of discretion by the Attorney General must be extreme and clearly indefensible.” By use of strong and definitive language to establish a standard of review, the court made it virtually impossible to compel the exercise of wholly discretionary duties by mandamus.

[165. CAL. WATER CODE § 13331 (West 1970).]
[166. See also CAL. WATER CODE §§ 13340, 13350 (West 1971).]
[167. CAL. FISH & GAME CODE § 5800 (West 1958).]
[168. 197 Cal. App. 2d 640, 17 Cal. Rptr. 584 (1961).]
[169. CAL. CIV. PRO. CODE § 803 (West 1955) provides in part: An action may be brought by the attorney-general, in the name of the people of this state . . . upon a complaint of a private party, against any person . . . or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.]
[170. 197 Cal. App. 2d at 648, 17 Cal. Rptr. at 590 (1961).]
Under this "extreme and clearly indefensible abuse of discretion" standard, the use of many environmental protection powers is left almost totally within the discretion of the respective government attorney. For example, Public Resources Code section 2558 declares that a district attorney or city attorney "may" enjoin certain placer mine operations whichdangerously pollute a city's water.\textsuperscript{171} Similarly, Health and Safety Code section 39437 declares that a civil action "may" be brought to enjoin certain types of air pollution.\textsuperscript{172} Under the holding in \textit{City of Campbell v. Mosk}\textsuperscript{173} a court could compel the use of those powers only if the authorized government attorney was "clear and extreme" in the abuse of his discretion, a matter not easily subject to proof.\textsuperscript{174}

V. CONCLUSION

The attorney general, county attorneys and city attorneys possess numerous powers that can be used to protect the environment. The Attorney General possesses powers through his representation of state agencies, his involvement in state legal matters and his control over actions involving counties.\textsuperscript{175} He has broad independent powers under the common law,\textsuperscript{176} the Government Code, the nuisance abatement statutes and by virtue of his special air and water quality powers.\textsuperscript{177} On the other hand, county and city attorneys have only limited powers in relatively few areas. County attorneys possess certain powers through their representation of local agencies and districts, their actions on behalf of the state under the direction of the Attorney General, and their penal powers.\textsuperscript{178} Both county and city attorneys have the power to abate nuisances, and they also possess special air pollution control powers under the Mulford-Carrell Air Resources Act.\textsuperscript{179}

Although the powers of some government attorneys in the environmental area are extremely broad, there are still several areas in which expansion of those powers is desirable. Primarily, the limited power of local government attorneys should be

\textsuperscript{171} CAL. PUB. RES. CODE § 2558 (West 1972).
\textsuperscript{172} CAL. HEALTH & SAFETY CODE § 39437 (West Supp. 1973).
\textsuperscript{173} 197 Cal. App. 2d 640, 17 Cal. Rptr. 584 (1961).
\textsuperscript{174} \textit{Id.} \textit{See also} CAL. GOV'T CODE § 26528 (West 1968).
\textsuperscript{175} CAL. GOV'T CODE § 11042 (West 1966) provides that:

\begin{quote}
No state agency shall employ any legal counsel other than the Attorney General, or one of his assistants or deputies, in any matter in which the agency is interested.
\end{quote}

\textsuperscript{176} \textit{See} notes 121-30 and accompanying text \textit{supra}.
\textsuperscript{177} \textit{See, e.g.,} CAL. HEALTH & SAFETY CODE § 39000 \textit{et seq.} (West Supp. 1973); CAL. WATER CODE § 13262 (West 1971).
\textsuperscript{178} \textit{See} notes 78-87 and accompanying text \textit{supra}.
\textsuperscript{179} CAL. HEALTH & SAFETY CODE § 39261 (West Supp. 1973).
expanded. Local government attorneys now have narrow authority in the areas of public nuisance abatement and control of air pollution violations. Although the Attorney General has very broad statutory and common-law powers that can be used for the preservation of the environment, the Attorney General's Environmental Law Unit presently consists of only ten attorneys in contrast to the thousands of businesses and private individuals who continue to pollute the environment. Clearly this unit should be expanded. But even if this is accomplished, in order to further facilitate the protection of the environment, local government attorneys should be given broader authority. This would permit them to deal with environmental problems not brought to the attention of the Attorney General or not of sufficient importance to warrant the Attorney General's intervention.

Secondly, the elimination of traditional equity requirements for injunctive relief should become the rule rather than the exception in environmental protection actions. The Dickey Water Pollution Act, the Mulford-Carrrell Air Resources Act, and the 1947 California Air Pollution Control District Act have eliminated the traditional equity requirements of alleging and proving inadequacy of the remedy at law and irreparable injury in equity actions brought by authorized government attorneys. The elimination of these requirements enables many actions that would ordinarily fail to succeed due to proof problems. In the opinion of the author, this is a worthwhile change and should be expanded to encompass the entire field of environmental actions. Should this occur, actions in many other environmentally-related areas, such as cessation of waste, noise pollution and destruction of wildlife would receive an added stimulus.

Finally, one further change is needed to facilitate protection of the environment; that is the requirement that a judge determine the questions of fact in equity matters. It is uniformly held in California that in equity actions, such as nuisance abatement, the function of a jury is advisory only. In the field of environmental protection, however, the importance of the decision to both the local community and society as a whole mandates that any decision be made by those who best represent the people. A judge

181. See CAL. HEALTH & SAFETY CODE § 24252 (West Supp. 1973); CAL. WATER CODE § 13361(c) (West 1971).
sitting alone cannot adequately represent his community because of the limitations of his own perceptions and values. The crucial problem in environmental litigation has usually been the balancing of economic, social and environmental interests. It is submitted that the jury, representing a cross section of these interests, is the proper body to determine these questions which so critically affect the community at large. Of course it is arguable that the jury may be too sensitive to the economic impact of closing down a factory or shutting down a quarry to rationally consider environmental impact. It is likewise arguable, however, that a jury sitting in an environmental action would be acutely aware of its overriding responsibility to the community and thus pursue its consideration of the matter with more exhaustive reflection than would a judge. In any event it is the entire community which must suffer the effects of both environmental degradation and adverse economic conditions. Accordingly, a jury representing a cross-section of the community is a proper means of allowing public participation in the decisionmaking process.

Even without implementation of the changes suggested by this author, the powers of government attorneys exist in sufficient quantity and quality to severely curtail the most flagrant activities of those who continue to pollute our environment and dissipate our resources. Whether these powers are utilized to the fullest extent will, in the final analysis, be determined by what public opinion demands of its legal representatives.