

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
 Sacramento, CA 95814
 (916) 323-6225 FAX (916) 323-6826
 E-Mail: staff@oal.ca.gov



SUSAN LAPSLEY
 Director

Date: December 13, 2007

To: Eric Sauer

From: Chapter Two Compliance Unit

Subject: **2007 OAL DETERMINATION NO. 25(S)**
(CTU 2007-1029-01)
 (Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

2007 DEC 13 AM 9:03
 SUSAN LAPSLEY
 DIRECTOR

Petition challenging as an underground regulation pages 7 through 9, titled
 "Cleaner In-Use Heavy-Duty Trucks," of the 2007 State Implementation Plan

In issuing a determination, the Office of Administrative Law (OAL) renders an opinion only as to whether the language challenged in a petition is a "regulation" as defined in Government Code section 11342.600¹, which should have been, but was not, adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

On October 29, 2007, you submitted a petition to OAL asking for a determination as to whether pages seven through nine of the Revised State Implementation Plan (SIP) adopted by the Air Resources Board (ARB) on September 27, 2007, constitute an underground regulation.

The federal Clean Air Act (CAA) requires the U.S. Environmental Protection Agency (U.S. EPA) to establish national ambient air quality standards to protect the public health and welfare (CAA section 109). Each state that has one or more areas in which the national ambient air quality standards are not attained must develop a SIP to provide for implementation, maintenance, and enforcement of the national standards (CAA section 110(a)(1)). On September 27, 2007, the ARB adopted a revised SIP including the challenged pages seven through nine,

¹ If the language challenged in the petition meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the Administrative Procedure Act, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

titled “Cleaner In-Use Heavy-Duty Trucks.” These pages discuss NOx emissions of older trucks.

The SIP is a lengthy and complex document. OAL’s determination addresses only the language on pages seven through nine of the SIP adopted by ARB on September 27, 2007. We make no determination about any other component of the SIP.

Government Code section 11342.600 defines a “regulation” as any

... rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

To meet this definition, the challenged language must be a “rule, regulation, order or standard of general application.” Pages seven through nine of the SIP, however, do not contain any language that can be construed as a “rule, regulation, order or standard of general application.” Page seven of the SIP begins by stating that

Federal and State engine standards will ensure that by 2010 all new diesel heavy-duty trucks are 90 percent cleaner than new 2006 trucks.

These are goals for future engine attainment. They are an end result that the ARB ultimately may or may not achieve. The SIP goes on to discuss the scope of the problem of emissions of older trucks and how ARB proposes to approach the problem of reducing those emissions. The commitments to the U.S. EPA made in the SIP are enforceable only upon the state of California, not upon any member of the public. The challenged language concludes:

While the design and evaluation of the specific program features has yet to be determined, ARB staff estimates that this concept has the potential to reduce NOx deterioration emissions by approximately 50 percent.
(Emphasis added)

The plain meaning of the language on pages seven through nine indicates that this component of the SIP is intended to outline ARB’s proposed plan for complying with the CAA requirement to meet the federally adopted national ambient air quality standards. This component of the SIP deals with a proposed program to reduce emissions from older trucks, however, the language on pages seven through nine do not adopt any program, methodology, requirement or other process or procedure by which the ARB will require emissions to be reduced. No member of any identifiable group is required to take any action or incur any cost. Rather, pages seven through nine contain a commitment from the State of California² to the U.S. EPA that emissions will be

² Pursuant to Health and Safety Code section 39602, ARB is designated as the state agency charged with coordinating efforts to attain and maintain both state and national ambient air quality standards:

The state board is designated the air pollution control agency for all purposes set forth in federal law.

The state board is designated as the state agency responsible for the preparation of the state implementation plan required by the Clean Air Act (42 U.S.C., Sec. 7401, et seq.) and, to this end, shall coordinate the activities of all districts necessary to comply with that act.

Notwithstanding any other provision of this division, the state implementation plan shall only include those provisions necessary to meet the requirements of the Clean Air Act.

reduced. The ARB specifically states that the "specific program features" have yet to be determined. On page eight, the SIP specifically acknowledges that ARB must proceed with a rulemaking action to implement the SIP:

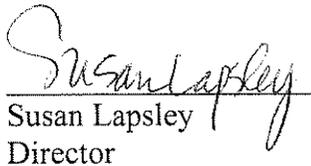
Rulemaking is currently in progress for a port truck modernization rule. ARB staff has also recently begun informational workshops on a heavy-duty truck in-use fleet rule, and has started to identify and explore the many emissions inventory, technology, financial, and logistical issues involved in crafting the most effective rule possible. ARB staff will be studying and requesting feedback from stakeholders on many issues, including: the characteristics of trucks registered outside of California; cost implications, especially to truck owner-operators, and ways to avoid any competitive disadvantage for various categories of truck owners; and the most efficient use of limited public incentive funds to achieve maximum emission benefits and lessen financial burden on truck owners.³

The SIP concludes on page nine with staff recommendations, which state that the timing for action to begin is in 2008, with the expected implementation in 2010-2015. Additionally, it provides that "ARB staff will initiate a rule development process designed to achieve the reductions shown..."

Pages seven through nine, therefore, do not contain any "rule, regulation, order, or standard of general application." OAL, therefore, determines that pages seven through nine of the SIP as adopted on September 27, 2007, standing alone without any other action by ARB, do not meet the definition of a "regulation."⁴



Kathleen Eddy
Senior Counsel



Susan Lapsley
Director

³ We note that the APA specifically encourages this type of workshop with affected parties in Government Code section 11346.45.

⁴ A petition which does not demonstrate that the challenged rule is an underground regulation is properly the subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review ... *demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion.* A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.

....

(Emphasis added.)