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IN THE OFFICE OF
2008 AUG 21 AM 11:03



John Brown
SECRETARY OF STATE

Date: August 21, 2008

To: Brian T. Kelleher

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 21(S)**
(CTU2008-0707-01)
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation the rule articulated by the State Water Resources Control Board in Order WQ-2004-0015-UST, In the Matter of the Petition of Murray Kelsoe

On July 7, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the Order WQ-2004-0015-UST, *In the Matter of the Petition of Murray Kelsoe*, (Kelsoe Decision), issued by the State Water Resources Control Board (Board) is an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not adopted pursuant to the APA.² 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.

Generally, a rule that meets the definition of a "regulation" in Government Code section

¹ "Regulation" means every 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.

² Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (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.

11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the procedural requirements of the APA. Government Code section 11425.60 states:

- (a) A decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency.
 - (b) An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (commencing with Section 11340). An agency's designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review.
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The Kelsoe Decision was issued by the Board on October 21, 2004, and dealt with the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 which authorized the Board to administer a program to reimburse underground storage tank (UST) owners and operators for eligible costs incurred as a result of contamination from leaking petroleum USTs. The holding in the Kelsoe Decision turned on the meaning of the phrase “has complied” in Health and Safety Code section 25299.57.⁴ The Petitioner states that although the Kelsoe Decision has been superseded by legislation in 2007⁵, the Board continues to apply it to UST cases arising before the change in the statute and that the application of the Kelsoe Decision to these cases constitutes an underground regulation.

Pursuant to Government Code section 11425.60, the State Board, in State Board Order WR 96-1 (Lagunitas Creek) issued in 1996, designated “...all decisions and orders it adopts at public meetings to be precedent decisions, except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the State

³ We note that Government Code section 11425.60 imposes additional requirements on an agency designating a decision as a precedent decision:

- (c) An agency shall maintain an index of significant legal and policy determinations made in precedent decisions. The index shall be updated not less frequently than annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register.

Compliance with these requirements is independent of the designation of the decision as precedent.

⁴ Health and Safety Code section 25299.57 permits the Board to pay for the costs of a corrective action that exceed the level of financial responsibility required to be obtained pursuant to Section 25299.32, if it makes a determination that, among other things, the claimant *has complied* with permit requirements. (Health and Safety Code section 25299.57(d)(3). The petitioner in the Kelsoe Decision argued that “has complied” means only that the petitioner must comply with current permit requirements. The Kelsoe Decision disagreed and found that the term “has complied” means that the petitioner must show he or she applied for or obtained a permit on or before January 1, 1990.

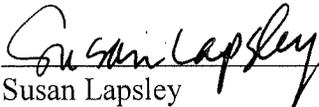
⁵ AB 1437, Chapter 282, Statutes of 2007. This legislation made various amendments which would apply to requests for funding from the Barry Keene Underground Storage Tank Cleanup Trust Fund Act of 1989 which were submitted after January 1, 2008, the effective date of the legislation.

Board.”⁶ The Kelsoe Decision, therefore, is a precedent decision that is exempt from the rulemaking requirements of the APA.

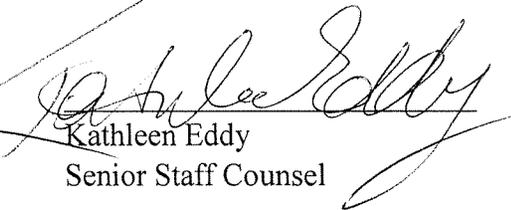
For the reasons discussed above, we find that the Kelsoe Decision is not an underground regulation.⁷

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Date: August 21, 2008



Susan Lapsley
Director



Kathleen Eddy
Senior Staff Counsel

⁶ State Board Order WR 96-1 (Lagunitas Creek), footnote 11 states:

Recent legislation provides for the designation of precedent decisions, so that persons participating in adjudicatory proceedings before an agency have access to decisions which may be relied on as precedent. (See Cal. Gov. § 11425.60, added by Stats. 1995, Ch. 938, § 21 p. 5538, eff. July 1, 1997.) It has been the SWRCB's practice to treat its decisions and orders as precedent. Of course, a prior decision or order may be distinguished or overturned by a later decision or order. Nevertheless, the treatment of SWRCB decisions and orders as precedent helps provide greater consistency and predictability in agency decision making. Recent decisions and orders are readily accessible, including availability on the SWRCB Internet site (<http://www.swrcb.ca.gov>) and the Lexis and Westlaw databases. Accordingly, the SWRCB designates all decisions or orders adopted by the SWRCB at a public meeting to be precedent decisions, except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the SWRCB.

⁷ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) 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 issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) The challenged rule has been superseded.

(B) The challenged rule is contained in a California statute.

(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)