

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: April 7, 2008

To: Center on Race, Poverty and the Environment and Norman Diaz

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 3(S)**
(CTU 2008-0206-01)
 (Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 27009)

Petition challenging as an underground regulation a new cost-effectiveness threshold for particulate matter pollution controls

On February 6, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the new cost-effectiveness threshold for particulate matter pollution controls issued by the Mojave Desert Air Quality Management District (MDAQMD) 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, 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.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250¹. Section 11342.600 defines a regulation as:

"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.
 (Emphasis added.)

¹ (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.

To be a regulation subject to the APA, the challenged rule must be adopted by a state agency. If the MDAQMD is not a state agency, it is not subject to the APA and its rules cannot be underground regulations as defined in the APA.

Air Quality Management Districts (AQMD) were created by Health and Safety Code sections 40000 and following. Section 40001 states:

(a) Subject to the powers and duties of the state [Air Resources Board], the districts shall adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law.

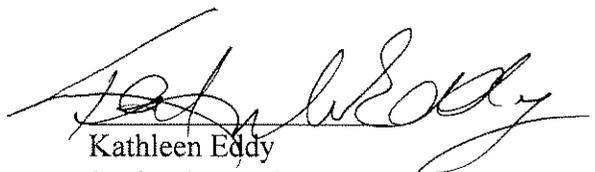
In *The People v. A-1 Roofing*, (1978) 87 Cal.App 3d Supp 1, at page 10, the court held that this language in Health and Safety Code section 40001:

means only that the Air Resources Board maintains a superior position to that of local districts, so as to assure that their regulations do not conflict with its overall responsibilities and programs. The section does not make each district into a "state agency" or require that its regulations be filed with the Secretary of State.

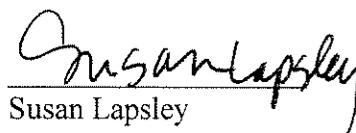
Based on the holding of the court and the language in the Health and Safety Code, we find that the MDAQMD is not a state agency and its rules do not meet the definition of a regulation in Government Code section 11342.600. The rule challenged in the petition was adopted by the MDAQMD and is not subject to the APA and is, therefore, not an underground regulation.

We note, however, that while OAL cannot find that the challenged rule is an underground regulation, rules and regulations adopted by AQMDs must comply with the requirements established in Health and Safety Code sections 40725 and following. These rules and regulations must be submitted to the Air Resources Board which is responsible for final approval. A challenge to a rule or regulation of an AQMD is more properly addressed to the Air Resources Board or to a court of competent jurisdiction.

Date: April 7, 2008


Kathleen Eddy
Senior Counsel

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225


Susan Lapsley
Director