Air Resources Board

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TO: Ellen M. Peter
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DATE: August 17, 2009

SUBJECT: Update to memorandum re variances and ATCMs

On August 10, 2004, the Office of Legal Affairs issued a Memorandum entitled "Variances from Air Toxics Control Measures". Since that time, the Office of Legal Affairs ("OLA") has had the opportunity to reconsider the opinions expressed in that Memorandum and, upon further consideration and review, modifies those opinions as set out below. Accordingly, the Memorandum of August 10, 2004, and all memorandums cited therein, are rescinded, and are replaced by this Memorandum.

The August 10, 2004 Memorandum (the "2004 Memo") addressed the issue of a hearing board's authority to issue a variance from the requirements of an Air Toxic Control Measure ("ATCM") in instances where a district had not adopted the ATCM into its rules, electing instead to implement and enforce the ATCM as adopted or implemented by the Air Resources Board. (The 2004 Memo references a prior OLA memorandum which opined that hearing boards had the authority to issue variances, upon proper findings, from ATCMs which had been adopted into a district's rules. As noted above, that memorandum is also rescinded.)

In summary, the 2004 Memo opined that hearing boards may issue variances granting temporary relief from ATCM requirements (provided the hearing board had substantial evidence upon which to base the appropriate findings required by Article 2 of Chapter 4 of Part 4 of Division 26) regardless of whether the district elected to incorporate into its own rules an "equally effective or more stringent" ATCM or simply implement and enforce the ATCM as adopted or implemented by the Air Resources Board, as provided under Health and Safety Code §39666(d). Section 39666(d) provides that, within 120 days after the Air Resources Board adopts or implements an ATCM, a district shall either implement and enforce that ATCM or propose regulations enacting the ATCM within the district.

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Upon further review and consideration, OLA takes the position that hearing boards may not issue variances from ATCMs regardless of whether a district elects to incorporate the ATCM into its rules or simply elects to implement and enforce the ATCM as adopted or implemented by the Air Resources Board. This memorandum explains this revised position.

In American jurisprudence, there has long been recognized a hierarchy of laws. In the same manner that laws adopted at the federal level take precedence over laws adopted by the states or their political subdivisions, so too do the laws adopted at the state level take precedence over those adopted at the local level. The federal Constitution provides that the laws of the United States shall be the supreme law of the land (U. S. Const., art IV) and all other laws must give way to them[1]. Similarly, the California Constitution provides that local entities may make and enforce such ordinances and regulations that are not in conflict with the general laws (Cal. Const. art. XI, §7)[2]. These provisions reflect the fact that we are more than residents of our locality, that we are residents of larger political entities (viz.) a state and a federal government and that as such we have rights and privileges, as well as responsibilities, associated with each.

Likewise, just as regulations adopted by federal agencies have the force and effect of federal law, regulations adopted by state agencies have the force and effect of state law. Duly adopted regulations carry the same weight and preclusive effect as the state laws legislatively adopted.

As discussed below, recognition of this hierarchy is incorporated into the statutes authorizing hearing boards to issue variances. The Health and Safety Code provides:

> "Any person may apply to the hearing board for a variance from Section 41701 or from the rules and regulations of the district."
> (Health and Saf. Code §42350(a))

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[1] See also Howlett By and Through Howlett v. Rose (1990) 496 U.S. 356, 110 S.Ct. 2430 "[T]he governments and courts of both the Nation and the several States [are not] strange or foreign to each other in the broad sense of that word, but [are] all courts of a common country, all within the orbit of their lawful authority being charged with the duty to safeguard and enforce the right of every citizen without reference to the *368 particular exercise of governmental power from which the right may have arisen, if only the authority to enforce such right comes generally within the scope of the jurisdiction conferred by the government creating them")
Howlett at p.367

[2] Furthermore, "[t]he Constitution itself confers upon all cities and counties the power to 'make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws.' (Cal. Const., art. XI, § 7.) (5) A city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law..." Crown Motors v. City of Redding (1991) 232 Cal.App.3d 173, p. 178

This section, then, provides the scope of authority of hearing boards when acting upon variance applications.

At issue in the 2004 Memo and prior related memos, was the interplay between the authorization of the hearing boards to grant variances from district rules and regulations (as quoted above) and the effect of the language in Section 39666(d) which allowed districts to incorporate ATCMs into their rules. Specifically, the question was if a district could incorporate an ATCM into its rules under Health and Safety Code §39666(d) then, once incorporated, would not the express language of Health and Safety Code §42350(a) provide a hearing board with the authority to grant a variance from that incorporated ATCM? Then, since Health and Safety Code §39666(d) gives a district the option to either adopt the ATCM into its rules or simply implement and enforce the ATCM as adopted or implemented by the Air Resources Board, is there a reason to require that the district that wishes its hearing board to have the authority to grant a variance from the requirements of an ATCM go through the rulemaking process as a condition precedent to the hearing board having that authority? OLA, in the 2004 Memo and prior related memos, relying on the wording of Health and Safety Code §42350(a), concluded that the language in Health and Safety Code §42350(a) should control and that a district electing to simply implement and enforce an ATCM as adopted or implemented by the Air Resources Board should not be required to conduct rulemaking in order to come under the variance language of Health and Safety Code 42350(a). As noted above, upon further review and consideration, OLA now takes the position that an ATCM is state law, that incorporation into a district's rules does not change the legal effect of the ATCM as state law, and therefore it is beyond the scope of a hearing board's authority to grant a variance from any requirement of an ATCM.

There is no reason why an ATCM should be treated differently from any other state law. Certainly the creation of an option for districts to implement and enforce an ATCM (either by adopting the ATCM into its rules or by simply enforcing it as adopted or implemented by the Air Resources Board) does not give rise to an inference that the Legislature intended that a locality could override that state law.

And if one were to argue that the express language of Health and Safety Code §42350(a) should be given literal effect, then that interpretation would lead back to a very disparate effect since the hearing board's authority would then be based solely on a district's election to incorporate the ATCM into its rules or simply implement and enforce an ATCM as adopted or implemented by the Air Resources Board. These results are too arbitrary to impute to the Legislature.

With the sole express exception of Health and Safety Code §41701, a hearing board's authority to grant variances extends only to a district's rules. With the inclusion of a

reference to §41701 in Health and Safety Code §42350(a), it is clear that the Legislature considered whether the scope of authority of the hearing boards should include the ability to grant variances from state law. By limiting the hearing board's authority to that one statutory provision, it is equally clear that the Legislature determined that variances should be limited to requirements imposed by district rules.

In sum, to argue that the Legislature's decision to provide districts with an election as to how it will enforce an ATCM can fundamentally alter the nature and effect of the ATCM as state law, goes beyond the language of the statute as well as logic. The need for uniformity of application and benefits derived from state law, the need to acknowledge the precedence of state law and action over local law and action, must be preserved. It should be noted that districts are free to adopt and enforce ATCMs that are more stringent than those adopted or implemented by the Air Resources Board. In the event that a district elects to set more stringent standards then, to the extent that the ATCM adopted by the district is more stringent than that adopted or implemented by the Air Resources Board, a hearing board may grant variance relief to the extent of that increased stringency, assuming that all other requirements of Article 2 of Chapter 4 of Part 4 of Division 26 are met. In these cases, the ATCM as adopted or implemented by the Air Resources Board would set a floor, or base standard, that would continue to apply. It is suggested that the hearing board identify the grounds upon which the determination that a district adopted ATCM is considered to be more stringent than that adopted or implemented by the Air Resources Board to ensure that the Air Resources Board may fully understand the action taken by the hearing board. All variances are to be forwarded to the Air Resources Board pursuant to Health and Safety Code §42360. Such an analysis will be helpful in the Air Resources Board's review of any variance order.

Some concern has been expressed over the inability to deal with breakdown situations as a result of the opinions set out this memorandum. First it should be noted that the 2004 Memo dealt with variances from air toxic control measures only. The 2004 Memo did not address variances from other state law requirements. Secondly, most districts have adopted a breakdown rule which requires a source to notify the APCO within a very short time of the breakdown. The rule generally requires them to provide such information to allow the APCO to determine if the breakdown qualifies under district rules as a breakdown condition. These breakdown rules require the source to maintain records of actions taken to mitigate and resolve the breakdown and to report details of the nature of the breakdown and remedial actions taken to address the breakdown to the APCO. If the source meets all breakdown condition requirements, these rules generally direct the APCO to use enforcement discretion if the breakdown results in a violation. If the source is unable to resolve the breakdown within 24hrs, the source is

required to shutdown. In lieu of shutting down, most rules provide that the source may seek an emergency variance.

Specifically to the issue raised, the use of an abatement order (or stipulated abatement order) with a compliance schedule to bring the source into compliance, together with the imposition of a financial penalty based on the facts underlying the enforcement matter, would be an appropriate response. Variances are not meant to be used as enforcement tools, but rather are to provide enforcement relief in situations where there are facts to support the statutory findings set out in Health and Safety Code §42352. Where an abatement order is issued, the APCO has wide discretion to determine the appropriate financial penalty within the scope of the criteria set out in Health and Safety Code §42403. Issues such as whether the breakdown resulted from lack of maintenance (Health and Saf. Code §42403(b)(5)) and other relevant factors can be addressed at that time.

It should be noted that ARB does have the authority to revoke or modify any variance issued (Health and Saf. Code §42362), but the reality is that in cases where the variance is short term, ARB does not really have the ability to respond to an illegal variance order. The statute requires that a variance must be submitted to ARB within 30 days, thus making it virtually impossible to effectively deal with a short term situation.

Should you have any questions, please let me know.