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FRESNO SUPERIOR COURT
By _____ DEPT. 52 - DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

JOE APODACA, an individual dba JOE APODACA TRUCKING, THOMAS J. HARRIS, an individual dba TJH TRUCKING, PETER MARQUEZ, an individual dba MARQUEZ ENTERPRISES, CALIFORNIA TRUCKING ASSOCIATION, CALIFORNIA BUS ASSOCIATION, CONSTRUCTION INDUSTRY AIR QUALITY COALITION, AMERICAN TRUCKING ASSOCIATIONS, INC., TRUCK RENTING AND LEASING ASSOCIATION, INC., TRUCK MANUFACTURERS ASSOCIATION,

Plaintiffs/Petitioners,

v.

CALIFORNIA AIR RESOURCES BOARD, an agency of the State of California, ALAN C. LLOYD, Ph.D., its Chairperson, MICHAEL P. KENNY, its Executive Officer, the OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT, an agency of the State of California, JOAN DENTON, its Director, the SCIENTIFIC REVIEW PANEL, a board of the State of California, and JOHN FROINES, its Chairman,

Defendants/Respondents.

No. 00CECG10832 Dept. 52

TENTATIVE DECISION
(Code Civ. Proc. § 632 and Cal. Rule of Court, rule 232)

1. Trial

The trial on the Complaint for Declaratory Relief and Verified Petition for Writ of Mandate of plaintiffs and petitioners came on for hearing on June 28 and June 29, 2005 in Department 52 of the above-entitled court, Judge Franklin P. Jones presiding. The plaintiff and petitioners ("plaintiffs") were represented by Laurence H. Levine (pro hac vice), Latham and Watkins by Patricia Guerrero, and Sagaser, Franson and Jones by Timothy Jones. Deputy Attorney General Bruce Reeves represented the California Air Resources Board ("CARB"), Dr. Allen C. Lloyd, the chairperson of CARB, Michael P. Kenny, executive officer of CARB, and the Scientific Review Panel ("SRP") and its chairman, John Froines. The Office of Environmental Health Hazard Assessment ("OEHHA") and Joan Denton, its director, were represented by Deputy Attorney General Susan Durbin. The court reviewed the Excerpted Administrative Record ("EAR") consisting of eight volumes and the Administrative Record ("AR") consisting of 45 volumes. The court considered the parties' briefs, counsel argued the matter, and the court took the matter under submission on December 22, 2005 following the completion of the review of the AR.

2. Background

(a) On August 27, 1998, CARB adopted Resolution 98-35 which identified Particulate Exhaust in Diesel-fueled Engines ("PEDE") as a Toxic Air Contaminant ("TAC") within the meaning of the Tanner Act (Health & Saf. Code, §§ 39650-39675), hereinafter the Tanner Act or the Act. The adoption of Resolution 98-35 was the result of at least three procedures conducted by three

entities pursuant to the Tanner Act:

(1) CARB conducted an Exposure Assessment (EAR 00821-00920) in which it evaluated the extent of the exposure of the population of California to PEDE;

(2) OEHHA conducted a Health Risk Assessment for diesel exhaust (EAR 01110-01566) in which it found an association between exposure to PEDE and lung cancer. Although significant, the association is nonetheless considered to be relatively weak from a statistical standpoint (EAR Vol. 2 pp. 01282-3). OEHHA did not fix or establish a single unit risk factor ("URF"), but rather found a range of risk as follows: 1.3 per 10^{-4} $(ug/m^3)^{-1}$, the lowest, to (2.4 x 10^{-3} per $ug/m^3)^{-1}$, the highest, with a geometric mean of 6 x 10^{-4} (EAR Vol. 2 at 01137). The range of risk set by OEHHA relates to the number of potential excess cancer cases from a lifetime (70 year) exposure to one microgram per cubic meter (ug/m^3) of PEDE. The risk factor of 1.3 x 10^{-4} (lifetime - ug/m^3) indicates an additional 130 additional cancer cases per 1 million population, while 2.4 x 10^{-3} (lifetime - $ug/m^3)^{-1}$ indicates an additional 2,400 cancer cases for a population of 1 million; and

(3) The SRP approved CARB's Exposure Assessment and OEHHA's Health Risk Assessment at its April 22, 1998, meeting. As part of its approval, the SRP set a single URF of 3 x 10^{-4} per microgram of PEDE exposure over a lifetime of 70 years $(ug/m^3)^{-1}$. The URF set by the SRP was accepted by CARB and incorporated in Resolution 98-35 by CARB (see Finding No. 19 of Attachment A to Resolution 98-35).

(b) On July 2, 1999, which was prior to the effective date of the identification, plaintiffs filed their

Petition for Reconsideration of the PEDE Listing with 14 Attachments consisting of studies or articles that contain scientific evidence, eight of which were prepared after the approval by the SRP of CARB's Environmental Risk Assessment and OEHHA's Health Risk Assessment. CARB denied plaintiffs' Petition for Reconsideration on July 20, 1999. The identification of PEDE as a TAC was incorporated in 17 CCR 93000 as Amendment 22 with an effective date of August 20, 1999. Resolution 98-35 and its incorporation in 17 CCR 93000 will be referred to hereinafter as "98-35."

3. Prior Action

On December 23, 1999, some of the current plaintiffs filed an action similar to this one in San Diego County Superior Court entitled *California Trucking Assn., et al, v. California Air Resources Board, et al,* Action No. GIC740825. That action was dismissed on August 22, 2000. The current action was filed in this court on October 10, 2000. Venue is laid in Fresno County on the basis that the Attorney General of California maintains an office within the County of Fresno (Code Civ. Proc., § 401).

4. Plaintiffs' Complaint

(a) Plaintiffs' complaint in this action contains five causes of action all of which are aimed at setting aside CARB's designation of PEDE as a TAC. In their First Cause of Action they seek a declaratory judgment that the "diesel TAC regulation and CARB's resolution no. 98-35 are invalid" under Code of Civil Procedure section 1060 and Government Code section 11350. Petitioners' Second Cause of Action seeks a Writ of Mandate under Code of Civil Procedure section 1085, commonly known as

traditional mandate, directing CARB to withdraw CARB's identification of PEDE as a TAC, withdrawing the unit risk factor (URF) adopted by CARB in connection with the identification of PEDE as a TAC, and suspending any activities related to risk management until after it has been established that diesel exhaust from improved diesel engines using improved fuel is a TAC using the "best available science and evidence" (Health & Saf. Code, § 39650(d)[1] and "sound scientific knowledge, methods and practices" (subd. (c) of § 39661). In their Third Cause of Action, plaintiffs seek to set aside the URF set by SRP and accepted by CARB because it is not supported by substantial evidence and contrary to sound scientific principles. In their Fourth Cause of Action, plaintiffs seek a Writ of Mandate under Code of Civil Procedure section 1085 against the identification of PEDE as a TAC because OEHHA's range of unit risk factors and SRP's unit risk factor (URF) were arbitrary and capricious. The Fifth Cause of Action seeks a declaration and injunction against CARB's identification of PEDE as a TAC, OEHHA's quantitative risk assessment and range of risk factors, and SRP's URF because all were *ultra vires* and illegal. They also seek an injunction to restrain implementation and enforcement of the allegedly *ultra vires* actions of CARB, OEHHA, and SRP.

(b) Although pleaded in five different causes of action, the thrust of plaintiffs' Complaint is that the identification of PE as a TAC in 98-35 is not supported by substantial evidence in the record, defendants failed to use sound

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

science, defendants ignored the best available science, and the designation was the result of ultra vires action by CARB, OEHHA, and SRP. To plaintiffs, 98-35 is the result of "junk science" applied by the three agencies. Plaintiffs emphasize that the URF of 3×10^{-4} $(ug/m^3)^{-1}$ is without foundation and that SRP acted beyond its statutory authority in setting the URF at its April 22, 1998 meeting that CARB later accepted and incorporated into 98-35. Plaintiffs' claim the setting of the URF by SRP was also "*ultra vires.*" Defendants contend plaintiffs should be denied all relief because the identification of PEDE as a TAC by CARB and the actions taken by CARB, OEHHA, and SRP are valid because the agencies acted within their statutory authority, their actions represented a reasonable exercise of the power vested in them, and those actions were not arbitrary, capricious or unsupported by substantial evidence.

5. Volume 45

(a) At the hearing, defendants sought a ruling that Volume 45 of the AR was not part of the record on the grounds that the writings in that volume were not before CARB, OEHHA, and SRP when they acted. They argue that since those writings could not have been considered by them, the writings should not be considered as part of the record before the defendants or this court. Volume 45 contains plaintiff's Petition for Reconsideration filed on July 2, 1999 with 14 Attachments. All of the Attachments are copies of studies relating to the issue of whether diesel exhaust is a lung carcinogen such as the CASAC Review of the Draft Diesel Health Assessment Document (Oct. 20, 1998) (Attachment 1), HEI, Diesel Emissions and Lung Cancer: Epidemiology and

Quantitative Risk Assessment (June 1999) (Attachment 2), and Valberg, P.A. and Watson, A. Y. (1999) "Comparative Mutagenic Dose of Ambient Diesel Engine Exhaust," Inhalation Toxicology 11:215-228 (Attachment 14). Eight of the 14 attachments are dated after April 22, 1998, the date the SRP approved CARB's Exposure Assessment and OEHHA's Health Risk Assessment[2].

(b) CARB was engaged in quasi-legislative rulemaking when it designated PEDE as a TAC. The general rule is that the only evidence a trial court should consider in passing on the validity of an agency regulation is that before the agency when it acted because that is the only relevant evidence (*Western States Petroleum Assn. v. Superior Court (Air Resources Board)* (1995) 9 Cal.4th 559, 573-574 (574). There is an exception for evidence that existed before the agency made its decision and it was not possible in the exercise of reasonable diligence to present that evidence to the agency before the administrative decision so that it could be included in the administrative record (*id.* at 578). The eight post identification articles or studies do not qualify under the first prong of the exception. With respect to the six prior studies, there is no showing why they could not be presented to CARB, and it appears all were in the record when CARB acted. The Petition and its 14 Attachments should not be made a part of the record in this proceeding unless there is another exception to the general rule limiting evidence

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[2] It does not make any difference whether April 22, 1998 is the cutoff date or whether some later date such as August 27, 1998 is the cutoff with respect to whether plaintiffs have a right to have their Petition for Reconsideration and all of its Attachments considered as part of the Administrative Record for purposes of the decision in this action.

to that before the agency when it acted.

(c) Subdivision (e) of 39662 provides:

> Any person may petition the state board to review a determination made pursuant to this section. The petition shall specify the additional scientific evidence regarding the health effects of a substance which was not available at the time the original determination was made and any other evidence which would justify a revised determination.

Subdivision (e) refers to evidence "which was not available at the time the original determination was made." The subdivision does not require that this category of evidence be in existence when CARB, OEHHA, and SRP acted. All that is required is that the evidence not be available which obviously applies to the eight post-designation studies since they were written later. The six studies written prior to the designation fall within, "any other evidence which would justify a revised determination," as alleged by plaintiffs. The second quoted phrase does not require that the evidence be created post designation, and could have been and was before CARB when it acted. Defendants' motion to exclude Vol. 45 of the AR is denied because subdivision (e) of section 39662 creates an exception to the rule announced in *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at 573-574. Therefore, the contents of Volume 45 is part of the AR and has been considered by the court.

6. Legal Issues

(a) Plaintiffs have the burden of proving that 98-35 is invalid (*Western States Petroleum Assn. v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1107. The standard of proof is not one of those followed in most other cases tried in

Superior Court such as beyond a reasonable doubt in criminal cases, preponderance of the evidence in most civil actions, or clear and convincing evidence which applies in a limited number of cases. Plaintiffs view it as a legal standard of whether defendants stepped outside of their authority and if their actions are supported by substantial evidence (Hearing Transcript ("HT") at 5: 8-26). The mission of the defendants, according to plaintiffs, is "whether based on sound science there is a health risk assessment that warrants the listing of a substance [PEDE] as a TAC." (HT 103:26)

(b) Here CARB acted in a quasi-legislative capacity in adopting 98-35 which became an amendment to 17 C.C.R. 93000, and therefore a trial court is required to apply a deferential standard of review (*Western States Petroleum Assn.* (1995) 9 Cal.4th 559, 574 and *Carrancho v. Cal. Air Resources Board* (2003) 111 Cal.Ap.4th 1255, 1269). The trial court must be governed by the following:

> (a) Limited review. Administrative rulemaking is quasi-legislative in character, and regulations have the force and effect of law. Accordingly, the validity of a regulation is subject to judicial review in the same manner as any other legislation (citations) ... The court exercises *limited review* out of deference to the separation of powers between the Legislature and the judiciary and to the agency's presumed expertise within the scope of its authority. Review is ordinarily limited to determining whether the agency acted within the scope of its delegated authority, whether it employed fair procedures, and whether its action is reasonable or is "arbitrary, capricious, or lacking in evidentiary support." (citations) ...."
>
> ...
>
> Quasi-legislative administrative action that transgresses the agency's statutory authority is

> void. In that case, the court does not review the action for abuse of discretion because there is no discretion to abuse. (citation) (9 Witkin, Cal. Procedure (4th ed.) Admin. Procedure, § 116 at pp. 1160-1161.)
>
> SUPPLEMENT: ... whether regulations were authorized was reviewed independently; whether regulations were necessary and proper was reviewed for arbitrariness and capriciousness]; ... exercise of rulemaking power is not to be narrowly prescribed; abuse of discretion must appear very clearly before courts will interfere ... particular deference must be given to agency decisions involving controversial issues that would entangle courts in "political thicket." ... courts let administrative boards and officers determine technical matters requiring assistance of experts and collection and study of statistical data with as little judicial interference as possible; ... agency's determination of appropriate level of methyl tertiary-butyl ether in drinking water involved distinctively legislative process, and court lacked authority to exercise independent judgment].
>
> (New) *Regulation outside agency's statutory authority will be held invalid....* citing *Caldo Oil Co. v. State Water Resources Control Board* (1996) 44 Cal.App.4th 1821) (9 Witkin, Cal. Procedure (4th ed.) Admin. Proc. section 116 at p. 369).

See also *Stauffer Chemical Company v. Air Resources Board* (1982) 128 Cal.App.3d 789, 796:

> In summary, the narrow scope of judicial inquiry into quasi-legislative actions is restricted to an examination of a record for procedural compliance and the existence *vel non* of an evidentiary basis for the challenged action in order to determine whether such administrative action was arbitrary or capricious. The reasoning or wisdom underlying the agency's action is beyond the scope of judicial inquiry."
>
> ...
>
> Moreover, judicial review of quasi-legislative action is limited to ordinary mandamus (citations).... Unlike the broad scope of review provided in administrative mandamus proceedings, review by ordinary mandamus is

> confined to an examination of the agency proceedings to determine whether the action taken is arbitrary, capricious or entirely lacking in evidentiary support, or whether it failed to conform to procedures required by law.... Such limited judicial review forecloses inquiry as to the agency's reasons for its legislative action. So long as a reasonable basis for such action exists, the motivating factors considered in reaching the decision are immaterial. (citations) The limited scope of review of quasi-legislative action is grounded upon the doctrine of separation of powers, which (1) sanctions legislative delegation of authority to an appropriate administrative agency and (2) acknowledges the presumed expertise of the agency. (citation) In technical matters requiring the assistance of experts and the study of marshaled scientific data as reflected herein, courts will permit administrative agencies to work out their problems with as little judicial interference as possible. (citation) (*Supra* at 794-795.)

(c) 98-35 must be within the scope of authority conferred by the Tanner Act (Gov. Code, § 11342.1) and 98-35 must be consistent and not in conflict with the Act and reasonably necessary to effectuate the purpose of the Act (Gov. Code, § 11342.2). Plaintiffs would be entitled to relief if defendants failed to follow the correct procedures, defendants failed to give the required notices, defendants acted arbitrarily or capriciously, or 98-35 is entirely lacking in evidentiary support (*Pitts v. Perluss* (1962) 58 Cal.2nd 824, 827-833).

(d) While a trial court must defer to an agency's rulemaking, it must apply its independent judgment on whether the agency acted beyond its statutory authority (*Western Oil & Gas Assn. v. Cal. Air Resources Board, supra,* 99 Cal.App.4th at p. 1008 and *RLI Insurance Co. Group v. Superior Court* (1996) 51 Cal.App.4th 415, 430). Thus, plaintiffs must establish that CARB, OEHHA, and SRP acted outside the scope of the Tanner Act and the

Administrative Procedure Act. While the *ultra vires* doctrine is generally associated with private corporations (Corp. Code, § 208 and 9 Witkin, Summary of Cal. Law (10th ed.) Corps. 120-122 at pp. 896-898, the doctrine applies to public agencies that act beyond or outside their statutory authority. A public entity acts in an *ultra vires* manner when its acts are beyond the powers conferred on it by statute, or if within their enumerated statutory powers, their acts were performed in an unauthorized manner (*Save Ellwood Murray Memorial Library Committee v. City of Palm Springs* (1989) 215 Cal.App.3rd 1003, 1017 and *Rathbun v. City of Salinas* (1973) 30 Cal.App.3rd 199, 203). Applying the independent judgment rule, I find and determine that CARB acted within the scope of authority conferred by the Act (§§ 39650-75) when it designated PEDE as a TAC in 98-35.

(e) In determining whether 98-35 is consistent with and not in conflict with the Act and reasonably necessary to effectuate the purpose of the Act as required by Government Code section 11342.2, the court is required to apply a more deferential standard. Applying that more deferential standard, I find and determine that 98-35 is consistent and not in conflict with the Act and is reasonably necessary to effectuate the purpose of the Act.

7. Validity of 98-35

(a) Subdivision (a) of 39655 provides:

> (a) "Toxic Air Contaminant" means an air pollutant which may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health.

PEDE is within the foregoing definition of a TAC. As a matter of

law, substantial evidence (see paragraph 7(b) hereof) supports the determination that PEDE is a lung carcinogen[3]. It does not matter whether the substantial evidence in the entire record test (cf. *Bowers v. Bernards* (1984) 150 Cal.App.3rd 870, 873-874 or the "any substantial evidence" test (cf. *Western States Petroleum Assoc. v. Superior Court* (1995) 9 Cal.4th 559, 571) is applied because the result is the same, i.e., there is sufficient evidence to support the determination that PEDE is a TAC. To the extent that arbitrariness and capriciousness involve anything other than lacking evidentiary support, defendants did not act arbitrarily or capriciously. In this regard it should be noted that acting arbitrarily and capriciously in an administrative law context has been equated with a lack of evidentiary support for the agency's action (*Western States Oil & Gas Assoc., supra,* 99 Cal.App.4th at 1017 and *Stauffer Chemical Co. v. Air Resources Board, supra,* 128 Cal.App.3rd at 796). The acts of defendants were not arbitrary and capricious because supported by substantial evidence.

(b) The following is a nonexclusive listing of the substantial evidence in the record that supports the identification of PEDE as a TAC because it is a lung carcinogen: Garshick, et al., 1987a; Garshick, et al., 1988; Williams, et al., 1977; Howe, et al., 1983; Harris, 1983; Wong, et al., 1985; Gustafsson, 1986; Balarajian, et al., 1987; Damber & Larsson, 1987; Horvath, et al., 1987; Benhamou, et al., 1988; Woskie, et

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[3] Although there is evidence in the record that PEDE causes health conditions or illnesses other than lung cancer, CARB did not rely on such evidence in determining that PEDE is a TAC. Rather CARB rested its identification on the lung carcinogenicity of PEDE.

al., 1988; Hammond, et al., 1988; Hayes, et al., 1989; Schwartz, 1989, 1991, 1993, and 1993; Gustavsson, et al., 1990; Steenland, et al., 1990; Burns & Swanson, 1991; Emmelin, et al., 1992; Swanson, et al., 1992; Hansen, et al., 1993; Speizer & Samet, 1994; Bhatia, et al., 1997; Steenland, et al., 1998; Smith, et al., 1998; Evaluation of Factors that Affect Diesel Exhaust Toxicity, Center for Environmental Research & Technology, College of Engineering, University of California, Riverside ("CERTA" Study); and Testimony of Drs. Dale Hattis, Duncan Thomas, Eric Garschick, Alan Smith, and Kathy Hammond before the SRP in 1998.

(c) In summary, 98-35 is a valid and enforceable regulation because CARB was authorized by the Act (¶¶ 39650-75) to promulgate it and therefore CARB acted within the scope of its delegated authority, the defendants used fair procedures, their actions were reasonable, and not arbitrary, capricious, or lacking in evidentiary support (*Pitts v. Perluss, supra,* 58 Cal.2d at 833). 98-35 is supported by substantial evidence in the record.

8. Plaintiffs' Contentions

(a) Plaintiffs contend that there is no substantial evidence in the record that the new reformulated diesel fuel that was introduced in 1993 when used in new technology diesel engines is a lung carcinogen. They also contend that the URF set by the SRP of 3×10^{-4} $(ug/m^3)^{-1}$ is without foundation, and that it should not have been set by SRP. The fixing of that URF by the SRP is the basis of plaintiffs' *ultra vires* argument. They say that any URF should have been

set by OEHHA, and not SRP. By setting the URF, SRP stepped outside of its role as scientific advisor to CARB and OEHHA and became a collaborator with them, or as plaintiffs put it a "cheerleader." Plaintiffs argue that the URF is unsupported by any substantial evidence, and there cannot be a valid identification of PEDE as a TAC without a valid URF. Finally, plaintiffs argue that the URF is being applied as an illegal "underground regulation" because it was not adopted pursuant to the Administrative Procedure Act ("APA").

(b) Plaintiffs claim that the identification of PEDE as a TAC lacks substantial evidence in that CARB, OEHHA and SRP relied on outdated studies involving old diesel engines burning dirtier diesel fuel. They are correct that the use of reformulated diesel fuel introduced around 1993 in technologically improved engines has resulted in a dramatic reduction in particulate pollution in the ambient air. Nevertheless, CARB could rely on the many exposed workers studies that establish PEDE is a lung carcinogen combined with a downward mathematical extrapolation to justify its TAC identification with respect to ambient air. OEHHA, CARB, and SRP could also rely on the study of improved diesel fuel being used in a more advanced engine which found the fuel's mutagenic aspects to be similar to old diesel (Final Report, Evaluation of Factors that Affect Diesel Exhaust Toxicity, Center for Environmental Research and Technology, College of Engineering, University of California, Riverside (AR 05606). The court finds and determines that substantial evidence in the record does support the designation of reformulated diesel fuel burned in modern diesel engines to be a TAC. The court

further finds and determines that there is substantial evidence to support the URF of $3\text{-}10^{-4}$ in that it is within the range of risk determined by OEHHA to be 1.3×10^{-4} to 2.4×10^{-3} $(ug/m^3)^{-1}$. The use of the Garshick studies and the other evidence mentioned in paragraph 7(b) hereof support the URF fixed by the SRP.

(c) In challenging the URF plaintiffs rely heavily on an exchange at the April 22, 1998 SRP meeting:

> Acting Chairman Froines: Oh, come on.
>
> Dr. Fucaloro: It comes out to be 5×10^{-4}.
>
> Acting Chairman Froines: These numbers -
>
> Dr. Glantz: 5×10^{-4}
>
> Dr. Fucaloro: I better verify that
>
> Dr. Glantz: If it comes out 5×10^{-4}, I'm happy. I just -
>
> Acting Chairman Froines: None of it is correct anyway.
>
> Dr. Glantz: Well, don't say that.
>
> Acting Chairman Froines: It's a risk assessment.
>
> Dr. Glantz: I know, but, thanks you just got yourself sued.
>
> Acting Chairman Froines: None of this is real.
>
> Dr. Alexeeff: Let me just make a -
>
> Ms. Shiroma: None of it is precise.
>
> ... (Vol. 45 AR25115).

The court is not able to determine what Acting Chairman Froines intended, but his words do not inspire confidence. The fixing of a URF is part of the risk assessment process.

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> Mark Twain was reported to have said that science is wonderful because it gives such rich returns in speculation for such a trifling investment in fact. To some extent, the same might be said for risk assessment. Our defense of risk assessment rests on the grounds that regulatory decision-making in this area is better off with the assessment, for all its uncertainties than without the assessment. Many of the uncertainties are inherent in any quantitative risk assessment; for example, extrapolation from animals to man, extrapolation from high doses to low doses, and so forth. Because of the magnitude of these uncertainties many have argued that quantitative risk assessment is useless. We disagree. Major expenditures of money and effort on public health problems requires justification. Expensive regulatory actions can hardly be launched without persuasive arguments that justify the expenditures in terms of the public health gains. In our opinion, quantitative risk assessment is crude and uncertain but can be useful particularly when the estimated risks are either very low or relatively high. Given the conservative approach used, for example, in the EPA cancer assessment group's risk assessments (e.g., the linear nonthreshold extrapolation model), a very low level of estimated risk is a factor against strong regulatory action. Conversely, high levels of estimated risk are a source of concern and are a stimulus to regulatory action. Hence, quantitative risk assessment can serve as a useful imput into the regulatory decision-making process. (Lewtas, Nesnow, and Albert, A Comparative Potency Method for Cancer Risk Assessment: Clarification of the Rationale, Theoretical Basis and Application to Diesel Particulate Emissions, Risk Analysis, Vol. 3, No. 2, 1983; AR, Vol. 34: 19626-19630).

Risk assessment is an imprecise business, and in that sense Ms. Shiroma was correct. Dr. Froines' facetiousness does not justify overturning the SRP's setting of the URF. The URF is a reasonable estimate that fell within the range of risk which OEHHA was required to establish if it did not itself set a URF on its own (Section 39662(d)). The Legislature authorized CARB, OEHHA, and SRP to act even though they did not have precise or exact

information. Section 39650 provides, in part:

> The Legislation finds and declares the following:
>
> ...
>
> (e) That, while absolute and undisputed scientific evidence may not be available to determine the exact nature and extent of risk from toxic air contaminants, it is necessary to take action to protect public health.

Section 39660 provides in part:

> (c)(1) The evaluation ... shall, to the extent that information is available, assess all of the following:
>
> (2) The evaluation shall also contain an estimate of the levels of exposure that may cause or contribute to adverse health effects. If it can be established that a threshold of adverse of health effects exits, the estimate shall include both of the following factors....
>
> ...
>
> (f) - The office and state board shall consider all of the following information, to the extent that it is available: ...
>
> (4) information on estimated actual exposures to substances based on geographic and demographic data and on data derived from analytical methods that measure the dispersion and concentration of substances in ambient air. (Emphases added.)

Section 39665(b):

> The report shall address all of the following issues, to the extent data can reasonably be made available:
>
> (1) The estimated levels of human exposure and the risks associated with those levels. (Emphasis added.)

(d) Central to plaintiffs position is that the URF is invalid and that there cannot be a valid identification of PEDE as a TAC without a valid URF. They rely on the fact that CARB set a URF in all of its other TAC identifications that were

set forth in 17 CCR 93000 before it was amended to add PEDE as a TAC. Assuming for purposes of argument only that the URF set by SRP and accepted by CARB is not valid, it does not follow that the identification of PEDE as a TAC in 98-35 is not valid. OEHHA set a range of risks (1.3×10^{-4} to 2.4×10^{-3} $(ug/m^3)^{-1}$ and that is all that is necessary. (Section 39662(d) and Section39660(c)(2)(B)). Mercedes Benz vigorously opposed the identification of diesel exhaust as a carcinogen but conceded: "As previously noted, however, the absence of data to establish a unit risk factor does not mean that diesel exhaust cannot be listed as a TAC." (AR, Vol. 8 at 04360.) The setting of a single, fixed URF as SRP did is not a *sine qua non* of a valid identification of PEDE as a TAC.

9. Underground Regulation Issue

(a) Plaintiffs sought to have the court take judicial notice of 26 writings in support of their contention that the URF set by SRP and incorporated by CARB in 98-35 was being applied by CARB as an illegal "underground regulation." The URF was stated as 3 times 10 to the minus four per one microgram per cubic meter of lifetime exposure (3×10^{-4} per 1 $ug(m^3)^{-1}$). The URF translates to an estimate of 300 additional cancer cases per million population for each microgram per cubic meter over a lifetime exposure. Petitioner's basic thrust here is that the URF is a regulation within the meaning of Government Code section 11342.600 separate from the 98-35 regulation[4], and is invalid because not adopted in accordance with the Administrative

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[4] Plaintiffs do not contend that CARB, OEHHA, or SRP failed to follow the APA in adopting 98-35 or that 98-35 is otherwise an underground regulation.

Procedure Act ("APA"), Government Code sections 11340, et seq. For instance, Document 3 is entitled Risk Management Guidance for the Permitting of New Stationary Diesel-Fueled Engines by California Environmental Protection Agency, Air Resources Board, Stationary Source Division, Emissions Assessment Branch, October 2003, and reads in part:

> Estimate risk using the Scientific Review Panel's (SRP) recommended unit risk factor of 300 excess cancers per million per microgram per cubic meter of diesel PM [3 x 10^{-4} $(ug/m^3)^{-1}$] based on 70 years of exposure.
>
> For Group 2 engines, the Specific Findings Report should also report the full range of potential cancer risk using the range of unit risk factors (URF) identified by the SRP; 130 to 2,400 excess cancers per million per microgram per cubic meter of diesel particulate matter. The URF of 3 x 10^{-4} $(ug/m^3)^{-1}$ is commonly expressed as 300 excess cancers per million per microgram per cubic meter of diesel particulate matter. (Document No. 3 at p. 3)
>
> ...
>
> The screening HRA need only evaluate the potential inhalation cancer risk posed by the emissions of diesel PM from stationary diesel-fueled engines. In identifying diesel PM emissions as a toxic air contaminant, the SRP recommended a reasonable unit risk factor of 3 x 10^{-4} $(ug/m^3)^{-1}$ or 300 chances in a million, be used to determine the potential cancer risk from inhalation, and a reasonable reference exposure level (REL) of 5 ug/m^3 when evaluating chronic non cancer health impacts.... (Doc. No. 3 at p. 22).

The parties stipulated that the 26 documents of which plaintiffs wanted the trial court to take judicial notice,

> are what the plaintiffs claim them to be, and thus authentic under section 1400, subdivision (a) & (b) of the California Evidence Code, but defendants did not waive or qualify their objections, such as the objection that the documents in question constitute inadmissible extra-record evidence. (Stipulation and Order

Regarding Authenticity of Documents Submitted with Plaintiffs'Request for Judicial Notice filed July 14, 2005).

(b) Defendants contend that the URF is not a regulation, and therefore there was no need to comply with the APA in adopting the URF. They also contend that this issue is not ripe for decision in this action, because none of the plaintiffs have been required to take any action as a result of the adoption of 98-35. Defendants also request the court to take judicial notice of 2001 OAL Determination No. 6 ("Det. No. 6") dated August 7, 2001 in the event the court granted plaintiffs' motion to have the court consider the 26 documents in connection with the claim of plaintiffs that the URF is an underground regulation.

(c) Plaintiffs claim they are entitled to a judicial declaration that the URF is an underground regulation because in 2001 this court overruled the defendants' general demurrer to plaintiffs Third Cause of Action aimed at establishing that the URF is an illegal underground regulation. Plaintiffs did not present any evidence that any of the defendants have attempted to compel any of the plaintiffs to take any action with respect to 98-35 such as retrofitting an existing diesel engine to reduce the amount of PEDE it produces. Declaratory relief does require an actual controversy (Code Civ. Proc., § 1060). That requirement is not difficult to establish, and even the reasonable risk of a future controversy is sufficient (*Harney v. Contractors' State License Board* (1952) 39 Cal.2d 561, 564). Plaintiffs are entitled to have the court decide its underground regulation cause of action. First, plaintiffs have pled an adequate declaratory relief cause of action which justifies, if not compels, a decision

by the trial court (*Columbia Pictures Corp. v. DeToth* (1945) 26 Cal.2d 753, 762: "Declaratory Relief must be granted when the facts justifying that course are sufficiently alleged.") A trial court's discretion not to rule is sharply limited (*AICCO v. Insurance Co. of N. America* (2001) 90 Cal.App.4th 579, 590). That does not mean that plaintiffs are entitled to a favorable decision if their claim is not well-taken (5 Witkin, Calif. Procedure, 4th Ed., Pleading, § 831 at 288-289). The rule was stated in *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540 as follows:

> It is the general rule that in an action for declaratory relief the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a contract and request that their rights and duties be adjudged.... If these requirements are met, the court must declare the rights of the parties whether or not the facts alleged establish that the plaintiff is entitled to a favorable declaration (*supra* at 549).

(d) Government Code section 11350 lends support to the position of plaintiffs that the underground regulation cause of action is ripe and should be decided. It provides in part that any interested person may obtain a judicial declaration as to the validity of any regulation or order or repeal by bringing an action for declaratory relief in the Superior Court in accordance with the Code of Civil Procedure. Subdivision (d) of section 11350 restricts the evidence that a trial court may consider which generally is limited to the "rule-making file" that did not include documents 1-26. That subdivision does, however, allow, "any evidence relevant to whether a regulation issued by an agency is required to be adopted under this chapter." The Law Revision Commission Comment to Government Code section 11350 states in

part:

> Subdivision (d)(4) permits consideration of any relevant evidence for the purpose of determining whether a regulation used by an agency is required to be adopted under this chapter-i.e., whether it is an invalid "underground regulation".

Exhibits 1-26 fall within subdivision (d)(4) of Government Code section 11350, and therefore the court has taken judicial notice of them in connection with plaintiffs' underground regulation claim that is the subject of their Third Cause of Action, and which is implicit in all of their other causes of action. Thus, subdivision (d) of 11350 provides a second exception to the general rule of *Western States Petroleum Assn. v. Superior Court (Air Resources Board)* (1995) 9 Cal.4th 559, 573-574 that only the Administrative Record at the time of the agency's action should be considered by the agency and by the trial court in ruling on the sufficiency of evidence in the record.

(e) The court originally said it would not take judicial notice of Det. No. 6 because it was inadmissible as an expert opinion on an issue of law (cf. *Williams v. Coombs* (1986) 179 Cal.App.3d 626, 638 and *Downer v. Bramet* (1984) 152 Cal.App.3d 837). The OAL has been charged with the overall oversight of the creation of statewide regulations, and therefore has the power to determine whether a provision promulgated by an agency is a regulation that must be adopted in accordance with the APA (Gov. Code, § 11347.7, subd. (b) and *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431). The OAL is deemed to have special expertise in this area. OAL's contemporaneous administrative construction of Government Code section 11342.600 and related statutes is

entitled to great weight and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. (*Rivera v. City of Fresno* (1971) 6 Cal.3d 132, 140.) Det. No. 6 may be the subject of judicial notice under Evidence Code section 452(a) and (c). The court has taken judicial notice of Det. No. 6, and has given it "due consideration" (*Grier v. Kizer, supra*, at 434).

(f) The URF set or established by SRP was accepted by CARB and is incorporated into 98-35 as part of Finding 19 in Attachment A. Finding 19 provides in part:

> There are data from human epidemiological studies of occupational exposed populations which are useful for quantitative risk assessment. The estimated range of lung cancer risk (upper 95 percent confidence interval) based on human epidemiological data is 1.3×10^{-4} to 2.4×10^{-3} $(ug/m^3)^{-1}$ (Table 2). After considering the results of the meta-analysis of human studies, as well as the detailed analysis of railroad workers, the SRP concludes that 3×10^{-4} $(ug/m^3)^{-1}$ is a reasonable estimate of unit risk expressed in terms of diesel particulate. Thus, this unit risk value was derived from two separate approaches which yield similar results. A comparison of estimates of risk can be found in Table 3. (EAR, Vol. 1-00033)

Government Code section 11342.600 defines "regulation" and provides in part:

> ... 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."

Labeling a provision a regulation is not determinative of whether it falls within Government Code section 11342.600 (*Winzler v. Kelly v. Dept. of Industrial Relations* (1981) 121

Cal.App.3rd 120, 127). "... if it looks like a regulation, reads like a regulation and acts like a regulation, it will be treated like a regulation whether or not the agency in question so labeled it." (*State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702). Any doubt whether a given provision constitutes a regulation is to be resolved in favor of finding that it is a regulation that must be adopted in accordance with the APA or else it may not be applied or enforced (*Grier v. Kizer* (1990) 219 Cal.App.3rd 422, 438, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577).

(g) The URF of 3×10^{-4} is not a regulation within the meaning of Government Code section 1342.600 or any of the cases relied on by plaintiff or any found by the court. It is an integral part of 98-35 which is a regulation that was validly adopted and incorporated in 17 CCR 93000 after full compliance with the APA[5]. The hallmark of a regulation is its general applicability. 98-35 will apply generally to PEDEs in the ambient air of California in the second or control phase of the TAC process (Sections 39665 and 39666). Emitters of PEDE may be called upon to reduce their PEDE emissions from particular equipment. Reduction of emissions from a particular type of diesel engine will be the result of the operation of 98-35 or new regulations that will apply to similar equipment in a similar region in a similar manner. The URF is a scientific opinion of SRP set or fixed in its advisory capacity to CARB

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[5] Plaintiffs do not contend that defendants failed to comply with all the procedural requirements of the APA in adopting the 98-35.

(Section 39670 and Det. No. 6 at p. 10). The URF is a justification for defendants to act: they believe that California can expect 300 additional cancer cases per one million population because of ambient exposure to PEDE. Therefore, the CARB should act to cut down the amount of PEDE in the atmosphere in order to reduce the number of cancer cases. Emitters will have to respond to 98-35 or to specific future regulations aimed at particular equipment. The individual emitter will not have to reduce his or her emissions to a level such that California will have no additional cancer cases per year rather than the estimated 300. There is simply no way the individual emitter could comply with such a demand. That impossibility lends support to the proposition that the URF serves as a rationale or justification for California to act pursuant to the Tanner Act to reduce the number of additional California cases by reducing the emissions of PEDE into the ambient atmosphere, rather than as an underground regulation.

10. Tentative Decision

This Tentative Decision shall serve as the court's Statement of Decision unless within 20 days a party specifies controverted issues or makes proposals not covered in this Tentative Decision. If a request is made, counsel for the defendants shall prepare a Proposed Statement of Decision and a Proposed Judgment. The parties shall proceed in accordance with Code of Civil Procedure section 632 and California Rule of Court, rule 232.

DATED this 17th day of FEBRUARY 2006.

Franklin R. Jones

FRANKLIN R. JONES
JUDGE OF THE SUPERIOR COURT

FEB 23 2006

LATHAM & WATKINS LLP
SAN DIEGO

SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Probate Department, Central Division 1100 Van Ness Avenue Fresno, California 93724 (559) 488-3625	*FOR COURT USE ONLY* FILED FEB 17 2006 FRESNO SUPERIOR COURT By _____ DEPT. 52 - DEPUTY
TITLE OF CASE: **Apodaca, et al vs California Air Resource Board**	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: **00CECG10832**

I certify that I am not a party to this cause and that a true copy of the **Tentative Decision** was mailed first class, postage fully prepaid, in a sealed envelope addressed as shown below, and that the notice was mailed at Fresno, California 93724, California, on:

Date: **February 17, 2006**

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