

Townsend, Erle

From: William Clardy <william@clardy.org>
Sent: Monday, February 5, 2024 4:48 PM
To: DEP Rule Comments
Subject: Comment on Chapter 127-A: Advanced Clean Cars II Program (Reposting)

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The draft rule unambiguously states in Section 3, “This chapter incorporates by reference certain sections of Title 13, CCR ~~California Code of Regulations~~.” (emphasis added) In Section 2, “CCR” and “California Code of Regulations” are defined as “the official compilation and publication of the regulations adopted, amended or repealed by California state agencies pursuant to the California Administrative Procedure Act.”

Under a plain-language reading of the Maine Administrative Procedures Act, the Department of Environmental Protection (“the Department”) has no authority to incorporate California regulations by reference.

All Maine regulatory agencies, including the Department, derive their rulemaking authority from Subchapter 2 of the Maine Administrative Procedures Act, specifically §8052, Rulemaking, and §8056, Filing and Publication. The only statutory provision for defining a rule using incorporation by reference is in sub-paragraph 1.B.(1) of §8056:

“(1) Through rulemaking, an agency may incorporate by reference all or any part of a code, standard, rule or regulation that has been adopted by an agency of the United States or of this State or by a nationally recognized organization or association.”

The later portion of this sentence clearly establishes the limits of the Department’s authority to incorporate rules by reference. The incorporated rule must have been adopted by “an agency of the United States or of this State or by a nationally recognized organization or association.” The Legislature explicitly omitted granting rule-making agencies any power to incorporate by reference the regulations of any state other than Maine.

Because this specific objection was ignored in the summary of public comments submitted last year, should the Department choose to adopt Chapter 127-A as written, you should be prepared for a FOAA request for any public records (documents, emails, etc.) specifically addressing the question of whether or not the Department is authorized by statutory language to incorporate other states' rules by reference.

Sincerely,

William Clardy
Augusta, Maine