

DRAFT for Stakeholder Comment

Plain Language Overview of Penalties for Violating the Air Resources Board Program Requirements

Introduction

The Air Resources Board's enforcement program is designed to obtain immediate compliance, make sure people who play by the rules are not disadvantaged, and stop future violations. ARB resolves several thousand violations a year and collects several million dollars in penalties, which are deposited in a special fund that is controlled by the California Legislature called the Air Pollution Control Fund (APCF). ARB penalties are based on an assessment of the relevant facts, including illegal emissions, the violator's intent or care, the financial position of the violator, any economic benefit derived from the violation, and, must be set at a level that convinces regulated entities that it is in their interests to comply. ARB issues press releases announcing its settlements and all ARB settlement agreements are public records. ARB publishes a detailed report cataloguing its enforcement activities each year.

The California Health and Safety Code establishes the penalties for violations of ARB program requirements. The Health and Safety Code sets the **maximum** penalties for each particular violation and, together with other legal authorities, ARB takes several factors into account in assessing appropriate penalties. In some cases, each item (an uncertified car) triggers a penalty. In other situations, each day a violation continues is a separate violation.

The California Health and Safety Code (HSC) establishes a system of **strict liability**, so an act prohibited by statute or regulation constitutes a violation. Under strict liability, factors like a violator's state of mind, the amount of illegal emissions he caused, his

financial condition or the economic benefit he got are taken into account to determine an appropriate penalty, not to excuse the violation. Strict liability is standard in environmental laws across the country (including the federal Clean Air Act), because environmental violations involve ongoing business activity and are not typically committed intentionally or even negligently. Without strict liability, air pollution laws would have very little deterrent effect. Strict liability penalties form the backbone of the air pollution enforcement system, but higher maximum penalties are available for intentional or negligent violations.

ARB has a long history of success in obtaining swift compliance along with substantial penalties and, in the vast majority of cases, is able to do so through engaging violators in a robust settlement process that employs negotiation and a free exchange of information to reach fair resolutions. However, where an appropriate settlement cannot be reached, ARB generally refers the matter to a prosecutor, usually the Attorney General, for civil litigation or criminal prosecution if warranted. Administrative hearings are available for some of ARB's cases, but as in its other cases, ARB decides whether to refer cases for administrative hearings. The Health and Safety Code does not provide criteria for determining when a case should be referred to administrative hearing.

Division 26 of the Health and Safety Code contains most of the statutory provisions of California air quality law. The Health and Safety Code recognizes two general types of air pollution sources: vehicular (mobile sources, such as cars) and non-vehicular (stationary sources, such as oil refineries). Division 26 is divided into four parts and generally allocates responsibility for control of vehicular sources to the ARB and primary control of non-vehicular sources to the local air districts, subject to the oversight of the ARB. Part 4 of Division 26 sets forth requirements for stationary sources and provides that violations may be punished either criminally or civilly. Part 5 sets out requirements

for mobile sources and fuels, and, except for one specific situation, provides for civil enforcement.

Penalties for Stationary Source, Assembly Bill 32 and Consumer Products Violations are Found in Part 4 of Division 26 of the Health and Safety Code

The penalties for violations of Part 4's requirements begin at §42400 of the Health and Safety Code. There are both criminal penalties (§§42400 through 42400.8) and civil penalties (§§42401 through 42403). These provisions set maximum penalty amounts based on the degree of a violator's intent, ranging from a maximum of \$1,000.00 per violation per day that can be imposed without a finding of any intent at all (known as strict liability), to \$1,000,000 per violation per day, for corporate violators, or \$250,000 for individual people, in cases of willful and intentional emissions of air contaminants that result in great bodily harm or death. The criminal provisions of Part 4 carry criminal fines identical to the civil penalties, but add possible jail sentences of 30 days per violation per day, up to 1 year per violation per day. Violations may be punished either civilly or criminally under Part 4, but not both ways (HSC §42400.7). Most violations are punished civilly.

Part 4's provisions originally applied only to stationary sources, which, again, are primarily controlled by the local air districts and not by the ARB. However, Assembly Bill 32 (AB 32), the California Global Warming Solutions Act of 2006, Pavley, Chapter 488 Statutes of 2006, changed this. AB 32 makes the Part 4 penalties applicable to violations of any requirement adopted by ARB under AB 32. New Health and Safety Code Division 25.5 codifies AB 32 and its §38580 applies the Part 4 penalties to AB 32 violations. Section 38580(a) provides that ARB shall enforce any rule, regulation or other requirement the Board adopts pursuant to AB 32.

The Health and Safety Code also gives the ARB authority to regulate certain specific sources of emissions, such as consumer products (HSC §41712) and air cleaners (HSC §§41985 – 41986). Because this authority is found in Part 4, the Part 4 penalty provisions also apply to violations of ARB’s consumer products regulations, title 17, California Code of Regulations, sections 94500-94575, and indoor air cleaner regulations at sections 94800-94810.

HSC §42403 requires that all relevant circumstances be taken into account when determining a penalty under Part 4. It lists several of them:

- “ 1. The extent of harm caused by the violation;
2. The nature and persistence of the violation;
3. The length of time over which the violation occurs;
4. The frequency of past violations;
5. The record of maintenance;
6. The unproven or innovative nature of the control equipment;
7. Any action taken by the defendant, including the nature, extent, and time of response of the cleanup and construction undertaken [*sic*], to mitigate the violation; and,
8. The financial burden to the defendant.”

Any violation of a Part 4 requirement may be enjoined pursuant to HSC §41513. This means that ARB can obtain a court order or “injunction” to stop violations from taking place.

Penalties for Violations of ARB’S Air Toxics Requirements Are Found in Health and Safety Code Sections 39674 and 39675

ARB enforces both state and some certain federal air toxic control measures (ATCMs) under HSC §39674. Strict liability penalties of up to \$1,000 per day per violation and penalties of up to \$10,000 per day, per violation for violations committed with negligence or intent are allowed by HSC §39674. Certain ATCMs may also be enforced under the civil or criminal provisions applicable to Part 4 stationary sources discussed above (HSC §39675). Since the regulations ARB adopts to control diesel particulate matter are in part adopted pursuant to ARB's authority to control air toxics, violations of the ARB's diesel retrofit regulations, for example, may also carry penalties under HSC §§39674 and 39675.

Penalties for ARB'S Mobile Source Requirements are Found in Part 5 of Division 26 of the Health and Safety Code

ARB is solely responsible for enforcing requirements contained in Part 5 of Division 26 of the Health and Safety Code and regulations enacted under it. These provisions deal with vehicles and fuels. Unlike Part 4, Part 5 relies almost exclusively on civil penalties, providing for criminal enforcement only for knowing violations of ARB's fuel regulations (HSC §43020). Any violation of a Part 5 requirement may be enjoined pursuant to HSC §43017.

HSC §43016 is the "catchall" penalty provision for violations of requirements adopted under Part 5 and applies where a specific penalty is not provided elsewhere in the Health and Safety Code. Section 43016 provides for civil penalties of up to \$500 per violation and is commonly applied to violations of the Small Off-Road Engine regulations (Title 13 CCR sections 2400-2409), for example. Of course, the economic aspects of violations are taken into account.

Part 5 does provide specific penalties for violations of prohibitions against transactions involving new motor vehicles that are not certified to ARB's emission standards, subjecting these transactions to civil penalties of up to \$5,000 per vehicle. These are the hallmark penalties that safeguard ARB's stringent motor vehicle emission standards. They were upheld in *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332, which rejected many of the legal challenges to ARB's ability to enforce its vehicle certification programs. There are other, specific penalty provisions in Part 5 for, among other things, selling vehicles that violate ARB's emission standards (\$5,000 per vehicle, HSC §43211), violating ARB test procedures (\$50 per vehicle, HSC §43212), and tampering with pollution control devices (Vehicle Code §27156) that can result in civil penalties of up to \$1,500 per violation in cases involving rental companies (HSC §430008.6) or \$1,000 per violation for car dealers (HSC §43012).

Fuels Penalties

Penalties for violations of ARB's fuel regulations are in HSC §§43026 and 43027 and are calculated on a daily basis like the Part 4 stationary source penalties. Willful violations of ARB's fuel requirements or standards are subject to civil penalties of up to \$250,000 per day, plus removing any economic benefit. Negligent violations of the fuels regulations (except documentation requirements) are subject to penalties of up to \$50,000 per day, but penalties of up to \$35,000 per day may be imposed on a strict liability basis. Documentation violations are subject to strict liability penalties of up to \$25,000. In fuels cases brought under §43027, each day (or month if monthly reporting only is required) is a separate violation.

Violations of the regulations adopted pursuant to the HSC's fuels provisions are subject to criminal prosecution under Part 5. HSC §43020 provides that it is a misdemeanor to knowingly violate an ARB regulation pertaining to motor vehicle fuels punishable by a

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maximum of six months imprisonment and a criminal penalty not to exceed \$1,000 per day of violation.

Conclusion

Although they are found in different parts of the Health and Safety Code, each source of air pollution, for example cars or fuels, has a specific penalty for violation.

Note: This summary is for information only and does not modify any provision of law.