

April 14, 2011

Mr. Paul Jacobs  
Chief Mobile Source Enforcement  
Enforcement Division  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

**Subject: CalChamber Comments on the California Air Resources Board's Proposed Enforcement Penalty Policy**

Dear Mr. Jacobs:

The California Chamber of Commerce (CalChamber) appreciates the opportunity to comment on the California Air Resources Board's (CARB) proposed enforcement penalty policy pursuant to SB 1402 (Dutton, Chapter 413, Statutes of 2010) as released on February 25, 2011.

The CalChamber is the largest, broad-based business advocate in the state, representing the interests of nearly 15,000 California businesses, both large and small. Many of CalChamber's members are subject to CARB's laws and regulations and thus would be directly impacted by the proposed enforcement penalty policy under CARB's enforcement program. CalChamber has been a constructive voice in several of CARB's air quality rules and regulations and we continue to do so in order to ensure air quality safety while maintaining the competitiveness of California businesses and the health of the economy.

CalChamber has identified areas of concern in the proposed policy and requests CARB's consideration to the following as CARB seeks to revise the proposed enforcement penalty policy. While we believe in consistent and effective enforcement, we have concerns with modifications of an enforcement policy when there is still much uncertainty in CARB's own regulatory statutes. With much uncertainty and pending elements around AB 32, we have concerns about ending up with duplicative penalties that could unfairly penalize compliance entities. In keeping this in mind, we urge CARB to carefully review its proposed changes to avoid unnecessary duplication and therefore inadvertent punitive penalties. The following focuses on assessment of penalty, determination of repeat violations, the assessment of financial impact, assessment of compliance program, and finally the need for a dispute resolution/variance program.

***Assessment of Penalty***

CalChamber believes that the assessment of penalties must be better defined. We ask that the first factor of penalty calculation be given consideration, 'extent of harm to public health and safety' so that the penalty be assessed based upon the level of environmental harm. With this in mind, penalties should not be set at the statutory maximum, especially not for those violations that do not

cause environmental harm such as administrative errors. It is recommended that these violations instead be assessed separately through a Notice to Comply program, similar to current practice done at the local air district level.

### ***Determination of Repeat Violations***

For purposes of determining a 'repeat violation' and hence imposing a penalty, CalChamber believes the 'compliance history of the violator' (factor 3) must be taken into consideration. A violation should be considered repeat only if the causation was the same as a previous violation. Similarity in violations is the only reasonable way to conclude that a violator's response to the initial compliance issue was inadequate. The current practice of considering all violations from a single enterprise as repeat violations unfairly escalates the penalty amount.

### ***Assessment of Financial Impact***

While we appreciate CARB taking an entity's current economic situation into account when assessing a penalty, we caution much carefulness in applying this consideration so that it does not inadvertently impact or set the financial burden on larger facilities. Given CalChamber's membership, we believe in fairness and balance in the rulemaking arena so as to not disproportionately impact one business over another. While we believe CARB's 'financial burden' consideration is intended to mitigate the penalties downward for smaller businesses so that those suffering from an adverse economy are not punished with an assessment in excess of their ability to pay, we have concerns over how 'financial burden' will be defined or measured as it relates to larger facilities. The economic recession has had an across the board impact on both small and large businesses with multi-billion dollar companies financially burdened in the current market. And while these companies may appear to be able to absorb these impacts, penalty fines of any magnitude are just as much of a financial detriment to large businesses as they are to smaller ones. CalChamber would like to ensure that 'financial burden' is properly assessed to treat both small and large businesses fairly. The 'financial burden' of an entity's financial condition should be viewed as a mitigating factor in moderating a penalty and NOT as an opportunity increase the penalty on what may appear to be a 'financially successful' company.

### ***Compliance Program***

CalChamber believes that the policy should take into consideration the quality of a facility's compliance program when determining penalties. For example, an operator with one facility and five violations may be deemed to have a poor compliance program. However, an operator with 25-30 facilities and only five violations among them should be deemed to have a good compliance program and thus penalties should be calculated accordingly.

### ***Dispute Resolution & Variance Program***

Related to CARB's Enforcement Policy Issue, CalChamber strongly believes that CARB should develop a dispute resolution process for CARB's stationary source programs. Such a program would give facilities the ability to challenge and resolve disagreements and potential enforcement actions through an independent process. Issues such as regulatory and program disagreements with an Enforcement officer's (EO) decision could be resolved in an appropriate manner using a fair and transparent process – a process that removes CARB as the final decision making authority and instead replace with an unbiased, third party administrator.

Without a dispute resolution or a variance process, an entity's recourses are limited. Currently, an entity's only course of action is to challenge the decision in court, which requires significant resources and time. Lawsuits are not only costly but very rarely solve the problem. CalChamber is a proponent of a transparent process that helps reduce money and time spent defending lawsuits so that regulated entities can instead focus their time and efforts on job creation and economic stimulation.

Finally, CalChamber also proposes that CARB incorporate a Variance program similar to what is currently in operation at local Air Quality Districts.

Again, we appreciate your consideration and the opportunity to comment on the proposed enforcement penalty policy. We look forward to further communication and the opportunity to engage with CARB on this issue as it moves forward.

Should you have any questions, please feel free to contact me at 916.444.6670.

Sincerely,

A handwritten signature in black ink that reads "Brenda M. Coleman". The signature is written in a cursive, flowing style.

Brenda M. Coleman  
Policy Advocate

BC:am