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California Council for Environmental and Economic Balance

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April 15, 2011

Submitted via email: pjacobs@arb.ca.gov

Mr. Paul Jacobs
Chief
Mobile Source Enforcement Branch
California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

RE: California Air Resources Board's "Proposed Enforcement Penalties: Background and Policy"

Dear Mr. Jacobs:

The California Council for Environmental and Economic Balance ("CCEEB") is a coalition of California business, labor and public leaders which strives to work together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

CCEEB appreciates the opportunity to offer the following comments on the "Proposed Proposed Enforcement Penalty Policy" ("Proposed Policy"). We hope that our comments can help achieve the goals and objectives laid out in SB 1402 (Dutton) - Chapter 413, Statutes of 2010 ("SB 1402").

CCEEB has concerns with the proposed enforcement penalty policy. Specifically, we question whether certain penalty factors currently being proposed by the California Air Resources Board ("CARB") adhere to the spirit and intent of SB 1402.

Related to our concerns and issues on the Proposed Policy, we also believe that CARB should institute an independent dispute resolution hearing board that would also handle stationary source issues, which can serve to address and resolve disagreements and potential enforcement disputes between a regulated party and the ARB Executive Officer ("EO").

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SB 1402 (Dutton) - Chapter 413, Statutes of 2010 ("SB 1402")

Section 43024 of the Health and Safety Code was adopted as part of Senate Bill 1402 (Dutton) - Chapter 413, Statutes of 2010. Section 43024 provides:

43024. (a) No later than March 1, 2011, the state board shall publish a penalty policy for civil or administrative penalties prescribed under Chapter 1 (commencing with Section 43000) to Chapter 4 (commencing with Section 43800), inclusive, and Chapter 6 (commencing with Section 44200).

(b) The policy shall take into consideration all relevant circumstances, including, but not limited to, all of the following:

- (1) The extent of harm to public health, safety and welfare caused by the violation.*
- (2) The nature and persistence of the violation, including the magnitude of the excess emissions.*
- (3) The compliance history of the defendant, including the frequency of past violations.*
- (4) The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance.*
- (5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods.*
- (6) The efforts of the defendant to attain, or provide for, compliance.*
- (7) The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature extent, and time of response of any action taken to mitigate the violation.*
- (8) The financial burden to the defendant.*

Compliance Concerns

The Proposed Policy does not clearly define a process to comply with the legislative intent of SB 1402 that penalties must bear a rational relationship to the harm and not exceed levels necessary to punish and deter. The proposal must clearly explain how CARB will utilize the criteria outlined in Section 43024 of the Health and Safety Code to ensure penalties are assessed in a transparent, fair, and consistent manner.

We believe the direction given to CARB through the language in SB 1402 is quite clear. Yet, it appears that CARB is using the opportunity to implement this bill to accomplish the following: redefine established penalty mitigation factors; introduce new factors that can be used to increase penalties; and, justify penalties closer to statutory maximums in more cases than in recent history.



We are also concerned that after releasing this proposal, CARB began including maximum penalty calculations in NOV's upon issuance. CARB is also including detailed explanations of the negotiated penalties in their settlement and release documents, and is posting these documents on its website. None of these steps are required by SB 1402; nor are the details of these approaches discussed in the penalty policy document.

CCEEB believes the discussion of financial burden is over-reaching and can overshadow other mitigating factors if viewed from the perspective of ability to pay vs. hardship.

CCEEB supports the proposed enforcement penalty policy directive that CARB shall take into consideration all relevant circumstances, including, but not limited to, a number of factors as set forth in the statute for determining a civil or administrative penalty. CCEEB urges CARB to continue to fully exercise the "including, but not limited to" approach when reviewing all relevant circumstances prior to assessing or negotiating penalties, and not begin a precedent of using the "maximum" penalty as the starting point for negotiations, which would give the appearance, if not the reality, of disregarding all other factors to be considered.

CCEEB's specific concerns are as follows:

1. Page 6 – The proposal introduces and emphasizes the term 'fairness'. This term is undefined and subjective. The proposal uses this term in different ways – consistency in level of penalties, but also proportional to deter non-compliance. At the same time it suggests that "to be fair", CARB must account for case-by-case circumstances.
2. Page 7 and throughout the document – The document focuses on the eight factors specified in SB 1402 including taking into account the "financial burden of the defendant." While this was clearly intended to mitigate the penalties downward for smaller businesses, the proposal uses the financial burden to justify increasing penalties based on ability to pay and in lieu of the other seven mitigating factors. SB 1402 requires CARB to take into account all mitigating circumstances. An example of this emphasis occurs on Page 15 where the proposal claims that penalty levels must take into account the "violators financial condition."
3. Page 16 – Terms such as "deterrence" and "fairness" are explained as general penalty principals, but appear to be subjective in terms of interpretation and application. This runs counter to the intent of SB 1402, which was to provide greater consistency and clarity.



4. Page 16 and Page 17 – The proposal states that penalties need to be assessed near maximum levels for older statutes to provide a deterrent effect. This is an opinion not backed up by the Health & Safety code – nor does it excuse ignoring the statutorily defined mitigating factors. Penalties should take into account the circumstances of each case, including any mitigating factors – not the age of the underlying statute.
5. Page 20 – The footnote acknowledges for fuels regulations that the eighth factor related to financial burden is based on the owner of a single station. Again, this suggests a downward adjustment factor for financial burden as opposed to an upward adjustment factor based on ability to pay.
6. Page 21 – In the first paragraph under “J”, the proposal suggests that additional factors such as public harm, illegal emissions, repeat violations, intent, impact on a particular regulatory program, unfair business advantage or similar factors may justify a penalty at or near the maximum despite the presence of other mitigating factors. CCEEB believes these additional factors are ill-defined or not specifically addressed in the Health & Safety Code whereas the mitigating factors CARB is looking to displace *are* addressed in the Health & Safety Code.
7. Page 21 – In the proposal CARB appears to be reinterpreting some of the eight penalty mitigation factors as follows:
 - a. (1) “extent of harm” now suggests that fuels, products, and equipment not properly certified are illegal and, therefore, all of the associated emissions are excess and illegal. This marks a change in how CARB views excess emissions – in the past, excess emissions were those exceedances above an emission standard. CCEEB believes that “extent of harm” should only apply to emissions exceedances because it is incorrect and counterintuitive to assume that any harm comes from fuel or equipment that meets all relevant emission requirements, but where a reporting or recordkeeping requirement was missed.
 - b. Page 22 – “preventative efforts” (4) and “magnitude of the effort required to comply” (5) now exclude normal standard of care or efforts that are common. Most defendants are going to use a normal standard of care and efforts common to industry to comply both in prevention of and in response to an incident. These additional burdens were not intended in the original mitigating factors but have been added by CARB in this document to deprive defendants of the benefits of these factors.



- c. Page 22 – “efforts of the defendant to attain, or provide for, compliance” now just references “preventative efforts” above. First, why have two factors if in CARB’s mind they essentially mean the same thing. Second, by referring to Factor 4, CARB is proposing to exclude normal standard of care from this factor as well.

Dispute Resolution

As CARB notes on Pages 9 and 13, the agency has discretion during the enforcement process to utilize an administrative hearing. With this in mind, CCEEB strongly recommends that CARB establish a hearing board that would also handle stationary source issues, similar to the process statutorily required of regional air districts for variance review, but with the added authority to also engage and resolve disputes between a regulated party and the Executive Officer. Such a board would provide a fair, efficient and predictable forum available to all regulated parties, and will reduce the money and time spent in litigation. It will also increase the transparency of the appeal process and thus afford all stakeholders the opportunity to comment during the hearing.

There are two types of cases when a hearing board is warranted. First, and most typically, a hearing board can issue a variance to a regulated entity that allows them to temporarily continue operations while they work to bring a source into compliance. This provides enforcement discretion by taking into account extraordinary or site-specific circumstances that may cause a source to violate air regulations, despite the best intentions.

Second, regulatory programs may be unintentionally designed or implemented in such a way as to make compliance impossible or overly burdensome for regulated entities, usually due to technical errors, or in cases where the EO and regulated party have differing interpretations of requirements. As both the scope and the complexity of CARB regulations expands, this problem can become more pronounced. Stakeholders should have the opportunity to resolve a disagreement with the EO, through an independent dispute resolution board or similar mechanism, without having to resort to costly and time-consuming litigation.

The scope of CARB’s mission has changed from focusing primarily on mobile source emissions to a much broader reach in recent years. For example, the recently adopted AB32 Cap & Trade regulations will no doubt raise many issues of concern and there will be disagreements between the regulated community and the EO, and therefore there is a need to allow operators the ability to resolve disagreements through an independent dispute resolution process. For decades, regional air districts have been statutorily required to maintain variance hearing boards to address a notice of violation to possibly allow a facility to continue to operate while resolving a compliance problem or obtain a variance. CCEEB supports a process that would oversee a dispute resolution that facilitates



settlement of technical disagreements between the regulated community and the regulator.

The CARB Executive Officer and staff make significant enforcement decisions. In cases where CARB decides to extend a compliance deadline, there is no process to formally and publically adopt that extension. The only appeal process available to a regulated party is to litigate. This requires significant resources and time for all parties involved and therefore, CCEEB believes a dispute resolution process would result in resolving disagreements in a more effective manner and avoid filing costly and time consuming lawsuits.

For example, the AB 32 program requires that CARB create a new, far-reaching, and complex program under very tight statutory deadlines. The statutory deadlines are driving rapid development of regulations that may have unintended consequences and unknowable problems. These types of problems need an independent dispute resolution board which can serve to address and resolve disagreements and to allow discussion and opportunity outside of traditional enforcement processes and litigation.

Suggested Changes

CCEEB would respectfully suggest the following:

- CCEEB urges CARB to continue to fully exercise the “including, but not limited to” approach when reviewing all relevant circumstances prior to assessing or negotiating penalties, and not begin a precedent of using the “maximum” penalty as the starting point for negotiations which would give the appearance, if not the reality, of disregarding all the factors to be considered.
- We believe the policy should place the greatest weight to the harm that is created by the violation, and likewise, the policy should also recognize violations that do not result in any environmental impact. Administrative or paper-work violations should not automatically be considered at the maximum penalty level.
- An independent hearing board be established by the California Air Resources Board, similar to the process statutorily required of regional air districts for variance review, that would also handle stationary source issues, but with the added authority to also engage and resolve disputes between a regulated party and the Executive Officer.



We appreciate the time and effort required to develop the Proposed Enforcement Penalty Policy. This is an important issue to our members, and we would like to work with CARB on these issues. If you have comments or questions concerning the enclosed comments, please contact me or Ms. Kendra Daijogo of The Gualco Group, Inc. at 916/441-1392.

Thank you for your consideration of the comments submitted.

Sincerely,



GERALD D. SECUNDY
President

cc: Honorable Linda Adams
Honorable Mary Nichols
Mr. James Goldstene
Mr. James R. Ryden
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